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1950

EDITED BY

GEORGE W. KEETON

AND

GEORG SCHWARZENBERGER

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PREFACE

This, the third volume of *Current Legal Problems,* contains the weekly public lectures on 'Current Legal Problems' delivered in the Faculty of Laws at University College, London, during the Session 1949–1950, and Lord Normand's Presidential Address to the Bentham Club.

It may be useful to repeat here in a few words the history of this series of volumes. The weekly public lectures on 'Current Legal Problems' were first instituted at University College, London, during the Session 1946–1947, and in the Session 1947–1948 it was decided to make the lectures available to a wider public and in more permanent form by publishing them in annual volumes. Then, during the Session 1948–1949, there was established the Bentham Club, a society of graduates of the Faculty of Laws of the College, whose main function is to enable contact to be maintained between graduates of the College and the Laws Faculty. It was then decided that *Current Legal Problems,* in addition to its original purpose, should also serve as an organ of the Bentham Club, and accordingly the second and the present volumes contain the presidential addresses delivered to the Bentham Club during each session.

We should like to thank the contributors for their co-operation in securing the prompt publication of this work, and we should also like to thank Mr. D. C. Holland, Assistant Editor of this volume, for having read the proofs and for having compiled the Tables of Cases, Statutes and Treaties and the Index. Finally, we wish to express our thanks to the publishers and printers for the speed and efficiency with which they have produced this volume.

THE EDITORS

University College, London
April, 1950

I

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—RETROSPECT AND PROSPECT

The Rt. Hon. Lord Normand

The subject on which I wish to offer some comments to you is the jurisdiction exercised by the Privy Council in appeals from overseas, and the future prospects of this jurisdiction. Recent changes have drawn attention to the role played by the Judicial Committee and have naturally raised the question whether it will have in the future the same importance as it has had in the past. Eire, Palestine, India, Pakistan, Canada and South Africa have all ceased or will soon cease to contribute to the appeals heard by the Privy Council. In 1933 the Irish Free State Constitution (Amendment No. 22) Act effectually abrogated the short-lived right of appeal to His Majesty in Council from the Supreme Court of the Irish Free State,[1] and now Eire has become a completely independent State. The termination of the Palestine Mandate has cut off another source. India has passed legislation abolishing the right of appeal to the Privy Council from the Courts of her territories. Her example is being followed by Pakistan. Canada in 1947[2] obtained from the Judicial Committee a ruling that Dominion legislation for the abolition of all appeals from all Canadian Courts, provincial and dominion, civil and criminal, was by virtue of the Statute of Westminster, 1931, *intra vires*, and has now passed the legislation which will give practical effect to that ruling. The Judicial Committee itself said in that case 'it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *British Coal Corporation Case*,[3] "a prime element in Canadian Sovereignty, which would be impaired if at the will of its citizens recourse could be had to a tribunal in the constitution of which it had no voice"'. South Africa is passing legislation which will cut off the right of appeal from her courts, a right of appeal which has for some years not been used. It does not follow as a matter of course that other Dominions will do as India, Pakistan, Canada and South Africa are doing. But in Australia and New Zealand voices have from time to time been heard to say that the right of appeal is derogatory to their status as members of the Commonwealth.

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[1] *Moore* v. *Att. General for the Irish Free State* [1935] A.C. 484.

[2] *Att. General for Ontario* v. *A.G. for Canada* [1947] A.C. 127.

There is therefore a possibility that the overseas jurisdiction of the Privy Council will be limited to the Channel Islands and to those territories which have not achieved the status of dominions, the colonies, dependencies and protectorates and mandated territories. It is natural to ask whether that has been an inevitable development or whether it might have been avoided if the Constitution of the Judicial Committee of the Privy Council had been different. We may inquire too whether the conduct of the Judicial Committee has given just ground of offence or whether on the whole it has been such as we can now look back on without feeling that it has fallen short of the standard which Cicero laid down: *Sapiens praetor offensionem vitat aequibilitate decernendi, benevolentiam adjungit lenitati audiendi.* There is also the question whether the loss of dominion appeals is an evil to be deplored, or whether we may not even regard it as a sign of the fulfilment of the purpose for which the appeal jurisdiction has always existed.

The answers to these questions depend on the history of the Judicial Committee. But its history is not widely known nor does it abound in dramatic or romantic events of the kind which excites popular interest. There is romance of a different sort in ample measure. For here was a jurisdiction wider in the area over which it was exercised, more varied in the population which it affected and in the laws which it administered than any that has ever been known. That has been the grand theme of so much eloquence that I hold myself excused from a new attempt to adorn it. Nor do I wish to torment you with an historical disquisition upon origins. Let it be agreed that the medieval *Curia regis* was the germ of two appellate jurisdictions, of the King in Parliament for the King's English subjects and later for the United Kingdom generally, and of the King in Council for the King's overseas subjects, first the inhabitants of the Channel Islands and then the inhabitants of all the territories which in time became subject to the Crown of England or of the United Kingdom.

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[3] [1935] A.C. 500.

A few landmarks may be noted since they illustrate the continuity of the jurisdiction from medieval times to the present hour. In 1580 an Order in Council prescribed the conditions for appeals from Guernsey and this order seems to have become the model in all subsequent territorial extensions of the jurisdiction. In 1627 an order to be observed in Assemblies of Councils provided that 'in voting of any causes the lowest councillor in place is to begin and speak first and so it is to be carried by most voices and when the business is so carried no publication is afterwards to be made how the particular votes and opinions went'. This was reaffirmed by Order of 1878 and it is the basis of the rules that the opinion of the Board is delivered in a single opinion, that no dissenting opinion is delivered, and that differences of opinion among the members of the Board are not disclosed. In 1696 an order was made that all appeals from any of the plantations be heard as formerly by the Committee who are to report the matter as heard by them and with their opinion thereon to the King in Council, and this too still governs the procedure of the Board. In the eighteenth century a limited number of Acts of Parliament dealt with the jurisdiction, for example the Act of 1773 setting up the Supreme Court of Calcutta and regulating appeals from it. But there was no departure from the system previously established till the Act of 1833[4] which for the first time constituted the Committee to try appeals as a committee of trained lawyers with judicial experience. At first the members of the Judicial Committee thus established were exclusively English lawyers. By the Act of 1887[5] all members of the Privy Council who held or had held 'high judicial office' were included and this change admitted Scottish and Irish judges if they were members of the

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[4] Judicial Committee Act, 1833.

[5] Appellate Jurisdiction Act, 1887.

Privy Council. In 1895[6] and 1908[7] provision was made to enable Chief Justices and Judges of a Supreme Court in the Dominions or an Indian High Court, if they were members of the Privy Council, to sit on the Judicial Committee. The number was at first limited to five, but in 1915[8] it was increased to seven. Finally in 1929[9] an Act was passed enabling the King to appoint two Indian lawyers to be salaried members of the Judicial Committee. It will be seen therefore that there was a limited attempt to bring into the Judicial Committee lawyers from the Dominions and India. In Indian appeals we always had in recent times one or more members of the Board who had held judicial office in India, and one wonders how the Judicial Committee got on without them in former years. Every year too a distinguished Canadian judge attended for about a month and heard appeals not only from Canada but from other parts of the Empire, and sometimes judges or ex-judges, who happen to be members of the Privy Council, come from other Dominions to take part in the hearing of appeals. But there has been no thorough-going attempt to draw into the service of the Judicial Committee the wealth of legal experience and ability available within the Empire or to make it truly representative of the King's dominions as a whole. Had that been done, a further step, sometimes discussed but never carried beyond discussion, might have been possible: it has been pointed out that the Judicial Committee need not be pinned down to Whitehall, and that the King's Council should be free to sit in any part of the King's dominions as the convenience of the King's subjects may require. The aeroplane has now made such a change practical, but too late!

Yet it is not probable that the abolition of appeals to the Privy Council which has taken place could have been avoided by enlarging the Judicial Committee by the addition of a considerable number of overseas judges or by making it peripatetic; nor do I think that we need have any regrets now that more was not attempted.

In *The Queen* v. *Bertrand*[10] the prerogative on which the

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[6] Judicial Committee Amendment Act, 1895.
[7] Appellate Jurisdiction Act, 1908.
[8] Judicial Committee Act, 1915.
[9] Appellate Jurisdiction Act, 1929.
[10] (1867) L.R. I.P.C. 520.

Privy Council Appeals are founded was described as 'the inherent prerogative right and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in individual cases, but also to preserve the due course of procedure generally'. It was necessary in the infancy of the Colonies that their courts should be subject to review by a tribunal for which the supremacy of law, the incorruptibility and impartiality of the judges and their independence of the executive were principles firmly established by ancient tradition. The chief task of the Judicial Committee was to establish these principles in new territories, 'to preserve in them the due course of procedure generally' until it became part of their tradition. The final accomplishment of its task might therefore lead to its own honourable extinction. What we have seen or are seeing is the recognition that its task has been accomplished in certain territories. It is not a necessary consequence of the final establishment of English principles of justice in a particular territory that its inhabitants should seek to abolish the appeal to the Privy Council: they may have good reasons of expediency for wishing to continue it, either in its original form or subject to limitations. But the continuance of the appeal or its abolition in those territories which have reached full political development is a question of convenience and not one of fundamental importance.

There are those who regret the abolition of appeals to the Privy Council as a sign of the weakening of the bonds of Empire. These regrets were perhaps justified where Eire was concerned. Palestine is a case apart, for the termination of the mandate was an event always foreseen and it necessarily ended a jurisdiction based on the prerogative. But let me take the Canadian case. For the action taken by the Canadian Parliament what reason have we for regrets? The means by which it has been accomplished have shown the greatest goodwill towards Great Britain, and the most anxious desire that nothing should be done that had not already received the consent and approval of the British Parliament in the Statute of Westminster. The obsequies have been attended with every pious observance. The basis of the legislation is that Canada has outgrown the need of a court of final appeal outside Canada, and that there are no subordinate grounds of expediency for retaining it. It is a final recognition that the safeguards for the due administration of justice have long been as firmly established there as they are in England. The sharing of common ideals for the administration of justice is in the modern world a far stronger bond between equal nations than the right of appeal could ever have been. There is in Canada a generous recognition that the Privy Council has had an honourable part in the development of its constitutional law, in securing to the provinces their due place within the Dominion, and in strengthening the hands of patriotic and enlightened Canadians who have striven to overcome difficulties created by differences of race, religion and municipal law within the boundaries of Canada.

In India also there is public acknowledgment of the aims which the Privy Council has kept before it and of its contribution to the better administration of justice. This is no new thing. In 1925 a resolution was proposed in the Indian Legislative Assembly recommending the establishment of a Supreme Court and the abolition of appeals to the Privy Council. It was opposed by Pandit Nehru who was reported as saying that 'inconvenience and expense were no high price to pay for the justice obtainable at the Privy Council and that he had known several instances where litigants had obtained justice at reasonable cost before the Privy Council in cases which they had lost from the lowest to the highest court in India. The Privy Council had laid down important principles which were useful in India. Moreover, it was useless to think of establishing a Supreme Court without *swaraj*'.

But though it is comforting to recall such acknowledgments of work well done it would be foolish to forget that there have been criticisms. Lord Haldane, whose reputation and long experience give special weight to his opinion, attributed Dominion tolerance of appeals to the practice by which the Privy Council in granting special leave to appeal takes account of the known attitude of the Dominion concerned.[11] Nevertheless there were occasions when the decisions or conduct of the Judicial Committee provoked irritation.

In 1903 for example the judgment in *Wallis* v. *Solicitor-*

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[11] The Judicial Committee of the Privy Council, *Empire Review*, July, 1923.

General for New Zealand[12] was the cause of protests from the bench, the bar and the public of New Zealand. The subject matter of the action was the administration of a charitable trust created by a cession of part of the native reserves by Maori chiefs to the Bishop of New Zealand for the erection of a college. This apparently innocuous litigation generated much heat. The judgment of the Privy Council contained sarcastic and wounding references to the Solicitor-General's conduct in the case and insinuations that the Court in New Zealand had failed in its duty and had been subservient to the Executive. Sir Robert Stout, Chief Justice of New Zealand, who had not himself been a party to the judgment reversed by the Privy Council, took up the cudgels to defend his colleagues, and in open court he charged the Privy Council with ignorance of New Zealand statutes, conveyancing terms and history. Williams, J., and Edwards, J., also protested, and the representatives of the New Zealand Bar present in court gave their support to the protests of the Bench. A *Times* leading article, written as the dust subsided, may be allowed the last word: 'judgments might be a little duller but they might not be less sound if the utmost attention were given to the susceptibilities of courts which are as independent as our own and resent as keenly as ours what they think to be grave charges'. In 1905 Sir Robert Stout raised a new complaint, this time of delays in disposing of New Zealand appeals. His complaint was immediately described by the Lord Chancellor in the House of Lords as wholly and absolutely inaccurate. Sir Robert had said that he was surprised that the Colonies endured that cases should be pending for two or three years before an appellant tribunal which sat thousands of miles away and whose judges looked on the Privy Council only as an institution for a stray exercising of their judicial functions. This the *Law Journal* described as a baseless and reckless attack and it was certainly stated in surprisingly immoderate terms. The New Zealand Law Society passed a resolution upholding the right of appeal and praying that it should be preserved. Nevertheless Sir Robert persisted and in a letter to the *New Zealand Times*[13] he said that many appeals had not been heard till two or more years had elapsed from the date of the decision in New Zealand. He gave statistics which do not altogether bear out this statement, for it appears that out of twenty-nine appeals all but four had been decided within three years from the date of the decision appealed against, and sixteen of them within two years. Yet his complaint was repeated by Mr. Seddon, the Prime Minister of New Zealand in October, 1907. *The Times,*[14] it may be noted, commented adversely on the delay in disposing of a criminal case on a capital charge tried in January, 1905 and disposed of by the Privy Council in February, 1906. It is proverbially the failing of courts of law to underestimate the importance of avoiding delay; and there have been no doubt times when the Privy Council was not sufficiently attentive to the due dispatch of its business. But there have been great improvements since 1856 when Lord Westbury said of it, 'no one can tell now at what time it will sit'.

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[12] [1903] A.C. 173.

[13] September 14, 1905.

In 1907 the Privy Council, reversing a decision of the Supreme Court of Victoria,[15] held that an officer of the Australian Commonwealth resident in Victoria and receiving his official salary in that State was liable to pay income tax upon it under an Act of the Victorian legislation. This was contrary to a previous decision of the High Court of Australia.[16] The question at issue concerned the rights of the Commonwealth and of the States *inter se* and that was a question upon which a decision of the High Court under section 74 of the Constitution of the Commonwealth is final and not appealable to the Privy Council except on a certificate granted by the High Court itself. Critics in Australia considered that the Privy Council ought to have shown more regard for the spirit of the Constitution and should have avoided a conflict with the High Court on this issue. The High Court in *Baxter's Case*[17] asserted its position as the tribunal invested by the Constitution with the power of final decision on *inter se* questions, and refused to follow the ruling of the Privy Council in *Webb* v. *Outrim*. The Commonwealth legislature passed the Judiciary Act of 1907, which gave the High Court exclusive jurisdiction 'in matters involving any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional power of any two or more of the States'. So in future no State Court could give a decision on an *inter se* question and no appeal could lie to the Privy Council except from a decision of the High Court and then only if the High Court granted a certificate. By the recent decision of the *Australian Banks Case*[18] the Privy Council has given the fullest recognition to the principle that these *inter se* questions are domestic questions for Australia.

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[14] February 10, 1906.

[15] *Webb* v. *Outrim* [1907] A.C. 81.

[16] *Deakin* v. *Webb* (1904) 1 Commonwealth L.R. 585.

[17] (1907) 4 Commonwealth L.R. 1087.

The origins of this dispute may be traced back to the time when the Commonwealth Constitution was being framed. The Australian negotiators would not accept Mr. Chamberlain's proposal to retain the full right of Appeal to the Privy Council and to strengthen the Privy Council by adding to it four colonial members with the rank of Lords of Appeal. In the end a compromise was accepted, the terms of which are embodied in section 74 of the Constitution. Australian opinion was not, however, wholly reconciled and Mr. Deakin at the Colonial Conference of 1907 expressed dissatisfaction with the work of the Privy Council and said that Australians desired to have an Order in Council giving the Colonies power to transfer their appeals to the House of Lords. In 1918 Mr. Hughes said that one reason for the tendency to limit the appellate jurisdiction was 'that the present system of appeals is not regarded by the Dominions as satisfactory. Especially in relation to its decisions on the Commonwealth Constitution the Privy Council has not proved a satisfactory tribunal'. It is indeed true that the appeals from Australia in which constitutional points have been decided have been full of difficulty and sometimes attended with public controversy. That was, I think, inevitable because they have so often been concerned with political issues on which public opinion had already ranged itself in opposing ranks before the case reached the Judicial Committee. It would have been beyond the power of any human tribunal to decide some of these cases without disappointing a substantial proportion of Australians. But it is proper to acknowledge that Australian criticism has kept within the bounds of courtesy and good temper; and perhaps with equal justice it may be said that the transgressions and failures of the Judicial Committee have not been greater than what must be expected of human frailty.

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[18] [1949] 2 All E.R. 755.

The Imperial Conferences held from time to time were not fertile in radical improvements. At the Conference of 1907 Sir Wilfrid Laurier, speaking for Canada, said there was some difference of opinion as to the necessity of appeals outside Canada, and this comment is borne out by the proposal brought forward in the Ontario legislature in February, 1909, to abolish the right of appeal and by the subsequent history of Canadian opinion. But the 1907 Conference contented itself with expressions of opinion that the procedure of the Judicial Committee should be codified, anachronisms and anomalies removed, costs and delays reduced, and that the prerogative right to grant special leave should be defined and restricted. It also adopted General Botha's resolution that when a Court of Appeal had been established for any contiguous group of Colonies, whether federated or not, to which appeals lay from the Supreme Court of such Colonies, the legislature of each Colony should have power to abolish appeals from its Supreme Court to the Judicial Committee; but the resolution went on to provide that leave to appeal against a decision of the Court of Appeal might still be granted either by the Court of Appeal itself in cases prescribed by the Statute under which it is established, or by the Privy Council. The adoption of this resolution by the Conference is significant of the growing tendency to restrict appeals which has coincided with the development of the political independence of the Dominions ultimately recognised in its fullest extent by the Statute of Westminster.

The 1911 Imperial Conference advocated one final Court of Appeal, for the whole Empire, in two divisions; one for the United Kingdom, consisting of the same persons who now sit in the House of Lords, and the other, 'for the Overseas Dominions, consisting of the persons now entitled to sit on the Judicial Committee, with such further additions as might be agreed upon', and strengthened by the addition of two English judges. In spite of support from the Imperial War Conference of 1918 this proposal was never acted on. The truth is that the time had gone by when the Prerogative could have been permanently secured by the inclusion of Dominion judges as regular members of the Judicial Committee. It is true that in 1920 Lord Cave on his return from a visit to Canada reported that in Canada there was complete approval of the Privy Council. The contemporary comment of *The Times* was that he did not rate quite high enough the sentiment of opposition to the right of appeal to the Judicial Committee which prevailed, if not in Canada, at least in some other Dominions. If it be borne in mind that in March, 1920 proposals had again been laid before the legislature of Ontario for the abolition of appeals from the courts of Ontario it is difficult to understand how Lord Cave could have received so unqualified an impression of universal approval. A number of letters appeared in *The Times,* some questioning Lord Cave's opinion and some approving it. These letters may still be of importance to the historian of the movement of opinion. Mr. Berriedale Keith's letter of December 2, 1920, has proved to be not wide of the mark. He said, 'public opinion in the Dominions is steadily adopting the doctrine that the carrying of appeals to the Judicial Committee is derogatory to the national status of the Dominions'.

It is, I think, a fair conclusion from the facts, that where the right of appeal has been lost or is threatened the cause is to be found, as was said in *A.G. of Ontario* v. *A.G. of Canada,*[19] in the political conception that a member of the British Commonwealth of Nations should not be precluded from setting up, if it so desires, a Supreme Court of Appeal with an ultimate and exclusive jurisdiction, and not in the manner in which the Judicial Committee performed its duties.

It is curious to reflect that the other court which sprang from the *Curia regis* also came to be a court of final appeal dealing with what to it was alien law. From the date of the Union in 1707 to 1867, when Lord Colonsay on retiring from the office of Lord President of the Court of Session was made a peer, the House of Lords attempted to deal with appeals from the Court of Session without the aid of a judge trained in Scots law. In 1851 the growing dissatisfaction with the decisions in Scotch appeals and with the delays in disposing of them came to a head. The Faculty of Advocates approved of a report by a committee which they had appointed recommending that a peerage should always be held by a Scotch lawyer, who should assist in the disposal of Scotch cases. In the same year another committee was sent to promote the scheme in London, where however they met with no encouragement. Their case was expounded in a pamphlet written by George Moir, then Sheriff of Ross and subsequently professor of Scots law in Edinburgh. This is a most enlightening and interesting document. It well describes the opinions of Scottish lawyers in the middle of the nineteenth century and I have liberally drawn on it in what here follows. It pointed out that of the English Chancellors since 1707 only Hardwick had a thorough knowledge of Scots law. Bathurst knew nothing of Scots law but Mansfield attended the hearings of Scotch appeals when Bathurst was Chancellor and Mansfield had a wide and profound knowledge of the feudal and the civil law. Eldon, I quote from Mr. Moir, 'attained a wonderful mastery in certain branches of Scots law. But his learning was bought by delay and great arrears. To lighten his burdens an English lawyer, Sir Robert Gifford, who had been Solicitor-General and subsequently Master of the Rolls, was made Deputy Speaker of the House of Lords and to him was assigned the duty of hearing Scotch appeals'. Lyndhurst recognised his own incompetence to decide points of Scots law and he obtained a commission appointing Chief Baron Alexander and Sir John Leach, M.R., to sit by turns as deputy speakers of the House of Lords and to take his place at the hearing of Scotch appeals. Their qualifications may have been little better than the Chancellor's own, but as they were not members of the House they were fortunately for themselves unable to deliver their opinions in the House, and they were in the habit of communicating their judgments to the parties privately. Lord Wynford when he became unfit to discharge the duties of the Chief Justice of Common Pleas was sent to the Lords as pro-Chancellor to decide Scotch appeals, and when a protest was raised his answer to it was, 'as well might they say that one who had studied logic in Edinburgh would not be able to reason on any question of morality or policy that arises in England'. Where, one wonders, did Lord Wynford learn his logic? Lord Brougham had greater confidence in his knowledge of Scots law than was justified by his few years of practice as a member of the Scottish Bar in his youth. His judgments were frequently unsound and he gave great offence in Scotland by sarcastic comments upon the judgments of the Court of Session which he delighted to reverse. Other Chancellors, more modest than Brougham and less candid than Lyndhurst, used to consult a Scottish judge or even a member of the Scottish bar before deciding a Scotch appeal. Even Eldon, it is said, used to consult his friend Lord Hermand. There is an anecdote that on an occasion he read over to Hermand his draft judgment and invited Hermand's opinion, when Hermand said, 'It is delightful—absolutely delightful. I could listen to it for ever. It is so beautifully written and so beautifully read. But, sir, it's the greatest nonsense. It may do very well for an English Chancellor but it would disgrace a clerk with us'. There were great complaints of delay and sometimes three years elapsed between the hearing of an appeal and judgment. Perhaps fortunately many judgments delivered privately to the parties were never reported and never heard of by the public or the profession at large, but some that were reported were plainly erroneous and even disclosed an entire ignorance of Scottish legal procedure. It is a cynical chapter in the history of English judicial proceedings and, compared with it, the record of the Privy Council is immaculate.

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[19] [1947] A.C. 127.

What then is the prospect for the Judicial Committee? The loss of the Canadian and Indian appeals will enormously reduce its business and it is impossible to ignore the possibility that more losses may follow. But the changes will not be all of one sort. Let us recollect that there was a time when the great bulk of appeals came from the West Indies. These dwindled but their place was taken by appeals from other Colonies and from India. Lord Haldane, in the article to which I have already referred, speaking of the growing importance of the African territories, said that in them native custom is becoming crystallised into law and that the outcome is litigation in local courts giving rise to appeals to the Sovereign in Council. In other African territories the white population is rapidly increasing and large developments of commerce, agriculture, forestry and defence organisations and depots are contemplated. These too will produce in time a crop of appeals as well, we may hope, as more nutritious crops. We cannot expect that any of these developments will sustain a volume of work in the Judicial Committee equal to that of recent years, but still the maintaining or establishing of a sound tradition in administering justice will continue to be the care of the Privy Council. May its honourable record continue till its work is finally accomplished.

2

THE CHANGING CONCEPTION OF TRUSTEESHIP

G. W. KEETON

I—THE SELECTION OF TRUSTEES

THE social revolution through which this country has been passing since the end of the recent war has affected every branch of English law in varying degrees. In some branches, the changes are obvious, for they have been brought about by legislation. Thus, the land law has been profoundly affected by the Town and Country Planning Act, 1947, and by the Agriculture Act, 1947. In other fields of law, the changes have been less obvious, since they have been brought about by the cumulative effect of judicial decisions, which, in the aggregate, may be almost as far-reaching as legislation. Where this process has taken place, however, or where it is still in progress, its extent may be disguised, because it occurs over a period (in contrast with the immediate impact of legislation), and also because the day-to-day changes which occur as a result of judicial decision are firmly linked with the past, to form a continuous and never-ending process of orderly evolution. The extent of changes of this nature can only be accurately gauged if we survey the product at different points, with a considerable interval of time between them.

One great branch of the law in which almost revolutionary change has occurred, but in which, nevertheless, this change has taken place almost completely unperceived, is the Law of Trusts. The trust, as Maitland long ago pointed out, is a most characteristic product of the English legal genius. It is almost inexplicable without a knowledge of the social environment in which it was developed. For example, it is by no means easy to explain in terms of legal rules, the difference between the medieval use and the modern trust. The task becomes simpler if we remember that the medieval use of land was imposed upon a feoffee for whom feudalism, with its social, economic and political consequences, was still an effective reality, whilst the trust, as it took shape in the eighteenth century Court of Chancery, was a device by means of which a country landowner in one of the freest societies the world has ever known made provisions of a far-reaching type for the various members of his family. The eighteenth century decisions which established the modern Law of Trusts are still our leading cases, although the social conditions in which they were decided have now completely passed away. Even in the nineteenth century, settlors and trustees were very different people from their eighteenth century counterparts. Today, settlors and trustees seem almost to inhabit a different world, in which property is consistently under attack, and in which the thriftiness and foresight of former generations is frequently denounced as anti-social. As might have been predicted, this inversion of social values has produced a harvest of novel and difficult problems within the law of trusts.

The rights and duties of trustees were first settled in detail by the Court of Chancery in the period between the Restoration and the close of the eighteenth century. Many of these were essentially administrative in character, and the standards of care prescribed by the Court of Equity were high. At this period of legal history, there was nothing in any way incongruous in expecting a member of the landowning class to devote considerable time and skill to the gratuitous administration of the property of a neighbour, and to incur heavy legal liability if his judgment proved erroneous. Indeed, at that period the standard of care in the discharge of private responsibilities was probably at its highest. In more recent times, however, the high standards prescribed by the great Equity judges of the eighteenth century have been relaxed by statute. This relaxation reflects changed social conditions. Today, it is becoming increasingly difficult to find persons of ability and standing to undertake the management of private trusts, as the complexity of modern life has steadily increased. For that reason the Trustee Act of 1925, s. 23, gave a general power to the trustee to delegate all ordinary routine business of the trust to agents, whom the trustee could remunerate for their services, and for whom (if properly appointed) the trustee was not legally responsible. Thus, it seems probable that in the future a clear division in function will exist between the trustee and his paid agents. The latter will perform ordinary trust business, whilst the activities of the trustee will tend increasingly to be confined to the selection of suitable agents, and to the exercise of the numerous discretions requiring personal judgment, which arise in the execution of a trust. Examples of such discretions (which the trustee may not delegate to an agent) are the determination of the price at which the trustee will sell trust property, or the determination of the proportion of the income of an infant beneficiary's share that the trustee will apply towards the maintenance, education and benefit of an infant beneficiary.

This change, though it has occurred imperceptibly and over a long period, is nevertheless a fundamental one. In the eighteenth century, the trustee-landowner dominated his agents. His general knowledge of affairs was in general superior to theirs, and the occasions when he would have recourse to their advice would usually be few, and they would be for limited purposes only. He would, for example, need a solicitor to conduct the litigation of the trust, but he would usually consider himself better qualified than any employee to decide what investments were proper for the trust, more especially as the range of permissible investments was narrower than it is now. Today, however, our social mechanism has become so complex that the trustee must of necessity rely upon the advice of an increasing number of highly qualified specialist agents, whose advice he ignores at his peril. The Trustee Act, 1925, therefore reflects this change of function when it provides, in section 23 (1) that the trustee is not responsible for such agents if they are appointed in good faith and if they possess the normal professional qualifications. The trustee today is a busy man, who finds it increasingly difficult, because of State interference, to control his own affairs. Increasingly, he has neither the time, nor the capacity, nor the inclination to spend considerable time administering a trust. He is therefore progressively becoming the chairman and co-ordinator of a number of professional specialists, who are enabled by statute to charge the usual professional fees for their services, and who incur no more than the customary professional liability for acts done by them in good faith.

This, however, is by no means the full extent of the change. A shortage of trustees of desirable calibre and standing has given rise to the custom of employing corporate trustees. There is the

Public Trustee, and there are the trust corporations; and the law of trusts, as it is at present, reflects the transitional period in respect of corporate trusteeship through which we are now passing. The Public Trustee was created by the Public Trustee Act, 1906, to satisfy a long-felt need for an official department which could undertake the administration of trusts of relatively small amount for persons whose range of acquaintances or relatives would not often include many suitable for the office of trustee. Behind such a department there would be the guarantee of the State for proper administration. The Public Trustee therefore may not decline to administer any estate solely because it is of small amount; but because he is a representative of government, he may not undertake a trust which includes the carrying on of a business, except for the purpose of winding it up. The Public Trustee's Office has not developed quite as was anticipated, however. Analysis of its reports will show that it is the medium-sized estate which it most frequently administers. The small estates have not been committed to its care in considerable numbers. The reasons may be conjectured. The man of small means may not know of the activities of the Public Trustee Office. If he consults his bank manager or his solicitor (if he has one) the result may quite often be that the solicitor or the executor and trustee department of the bank will administer his estate. At any rate, it is still the case that trust corporations such as those organised by the banks and the big insurance companies are more frequently the trustees for persons of small means than the Public Trustee is.

Such trust corporations, however, still labour under disadvantages as compared with the Public Trustee, for the Public Trustee has a statutory power to charge for his services, whilst they have not. Consequently, unless the settlor of small means knows enough of the Law of Trusts to insert a charging clause in his settlement or will, the trust corporation may be torn between a desire to extend its business, and its reluctance to administer an estate gratuitously. Attempts to overcome this difficulty by appointing the trust corporation to act as custodian trustee and also as managing trustee have failed.[1] In view of the fact that English trust corporations must have a nominal capital of not less than £250,000 of which not less than £100,000 must be paid up, it is suggested that in any future amendment to the Trustee Act, 1925, trust corporations should be placed upon the same footing as the Public Trustee in this respect. No harm could come of it, and the benefits would be considerable, for it is going to be still more difficult to find suitable people to act gratuitously as trustees in the future. Consequently, if this out-of-date restriction is removed, more and more trust work will pass to trust corporations. Indeed, in the future, solicitors and trust corporations may possibly enjoy almost a monopoly in this field. Each of these two types of trustee has its advantages. The solicitor often has the advantage of personal knowledge of settlor and beneficiaries, and his legal knowledge is of the first importance. On the other hand, the trust corporation has the advantage of absolute security, and it offers the service of the experts it employs. This, however, is not an unqualified blessing, for the expert staff of a trust corporation may see technical difficulties which are of small account in practice, with the possibility that application to court in doubtful cases may be somewhat numerous.

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[1] *Forster* v. *Deacon's Bank* [1935] 1 Ch. 359; *Arning* v. *James* [1936] Ch. 158.

One further point of distinction between the private trustee and the paid corporate trustee is slowly emerging: the law will exact a higher standard of care from the trust corporation, to the extent that it will rarely, if ever, be able to claim the benefit of section 61 of the Trustee Act, 1925.

The growth in the practice of employing corporate trustees, as we have seen, is the consequence of changed social conditions, resulting in the absence of suitable persons to fill the office of private trustee. Is it possible to probe a little deeper into the extent and implications of this great change? I think that it is. The typical trustee of the eighteenth century, it has been suggested, was the country landowner, who managed his estate thriftily, stood high in the estimation of the county, and almost certainly took his place upon the Bench at Quarter Sessions. Indeed, if we think of Addison's Sir Roger de Coverley we shall not be far wrong. By the second half of the nineteenth century he has changed greatly. He has become a professional man or a member of some well-established firm. He may sit upon one or two boards of directors, but if he does it will only be after a careful scrutiny of the company's business, and it will be with the intention of exercising vigilance in supervising the conduct of the company's business. Though he may be generous in his private affairs, he will be careful even to the point of parsimony in the expenditure of public money, and he will possess to a marked degree that nice and unheated judgment which, in the nineteenth century, was such a striking characteristic of the English upper middle class business man, with a public school background. In fact, if one wishes to see a full-length portrait of the ideal trustee of this period it is to be found in the pages of *The Forsyte Saga,* in Galsworthy's 'Man of Property', Soames Forsyte.

If we were to inquire today, however, why trustees of the calibre of nineteenth century middle class business men or their eighteenth century predecessors are no longer forthcoming, it would be necessary to write a long and depressing chapter of social history. Both of them lived well by modern standards. They worked hard, and they preserved (and sometimes enlarged) the produce of their labours with great skill. Yet they drew heavily upon their leisure for those innumerable public services without which the mechanism of public life cannot run smoothly. They sat in Parliament, they served on benches of magistrates, they were churchwardens, hospital governors and trustees. They had, in fact, a genius for committees, and it was in consequence of their outlook, that the committee system became the automatic means of transacting public business in England. Moreover, all these public services were performed, not only without payment of salary, but without payment of expenses. It is only in our own time that the 'service principle' has been erected into a dogma, and that simultaneously we have made generous payments for 'expenses' and broken time in respect of the performance of a public duty.

Two world wars, and a social revolution during the last half-century have gone far towards destroying this class. Moreover, today, commerce has largely ceased to be an enterprise calling for the exercise of initiative and nice judgment. Increasingly large sections of industrial and commercial activity are being placed outside the range of private enterprise altogether. Again, present rates of taxation make it impossible for a professional or business man to contemplate retirement at approximately sixty years of age, with the prospect of ten or fifteen years of public service before him. He must remain in harness almost to the day of his death, and since the conduct of his business has become incomparably more exacting than it was half a century ago, he has neither time nor energy to devote to public or quasi-public activities. Moreover, most unhappily, since the conclusion of the second world war there has gradually developed an attitude of mind that the services of the property-owning classes are somehow tainted. Not unnaturally, therefore, they have become a little reluctant to tender services which have so obviously not been wanted.

It may perhaps be suggested, however, that if the problem of the vanishing trustee is at bottom a social one, in due course a new race of trustees will arise from a different social background. Of that, however, there is as yet no sign at all. The whole trend of development in the law of trusts has hitherto favoured the middle class trustee. It is not that the trustee requires expert knowledge. Indeed, today, as we have seen, that is no longer true, for he is able to employ and pay whatever expert agents he may deem to be necessary for the discharge of trust duties. Nevertheless, the trustee must be, as in the past he must always have been, a man of affairs. He must have familiarity with the responsibilities of managing real property. He must know the implications of entering into a mortgage. He must keep some kind of watch upon the financial position of the country, so that he can decide what changes should be made in the condition of trustee investments. He must know, in general terms, at least, the effect of the modern avalanche of legislation upon the property which is subject to the trust. For example, two trustees of a will with whom I am acquainted, have vested in them a piece a land extending over a number of acres and which is capable of substantial development. Presumably, therefore, they have taken all necessary steps to secure compensation for loss of development rights under the Town and Country Planning Act, 1947, for if they have not, they may ultimately be sued by their beneficiaries. Now, however, the question has arisen of the price they should fix for the sale of the land, to close the estate. Although the trustees will almost certainly seek professional advice on this difficult question, ultimately the responsibility for the decision will devolve inescapably upon them. These, and innumerable similar decisions arising in the administration of a trust, can only rarely be suitably made by those who live in council houses, who earn a weekly wage, and do not operate a banking account. If present tendencies continue unchecked, it is possible to foresee the time when the law of trusts will be as obsolete as the law relating to widow's dower. In the transitional period, however, we shall employ increasingly the paid corporate trustee.

II—TRUSTEE INVESTMENTS

So far I have considered only the personal qualities of the trustee, and the increasing difficulty of finding suitable persons to fill the office. It is time now to turn to his functions. The primary and overriding duty of the trustee is to get in, preserve and administer the trust fund. This may come into the hands of the trustee either in a properly invested state (as will frequently occur where a trust is created during the settlor's lifetime) or as a fund which it is necessary to put into a proper state of investment. Even in the first case, problems of re-investment will frequently arise.

The root concept of trust property is just as much conditioned by its social background as the conception of the trustee is. The underlying assumption is that wealth can be accumulated in sufficient quantity within a reasonable time, so that when invested the income arising from it will be adequate for a number of social purposes, whether it be the maintenance of successive members of a family or the support of some charitable purpose, such as a church or a college. If national policy is aimed, as since the war it has been deliberately aimed, to frustrate those two purposes, then sooner or later they will fail. Already, far-reaching changes in our national habits have taken place. Today, it is no longer certain sections of the lower classes which live simply from week to week. It is virtually the entire community. In a period of inflation and currency devaluation there is indeed little possibility of an alternative. This, however, has as its inescapable consequence the fact that the natural desire of a man of ability to provide for his immediate descendants, and the desire of public spirited persons to provide for the continuance of voluntary activities to which they attach importance can no longer be satisfied. In both cases the country is the poorer, in more than one sense.

However, altogether apart from this ominous symptom, the trustee today is faced with other problems which add very greatly to his difficulties. We have seen that today society has become so complex that he must rely on expert advice, where his predecessor in the eighteenth and nineteenth centuries would have trusted in his own judgment. If the trustee wishes to turn a field into a recreation ground, or if he wishes to turn a substantial old house into flats, he will have to seek planning permission and pay development charge. He will have to enter into prolonged negotiations with a multitude of officials and public bodies through the intermediary of solicitor and architect. Even when he has incurred all this preliminary expenditure he may find his application refused or, even if it is granted, he may find that he is unable to procure materials, or labour, or both, to achieve what he wants. Thus, altogether apart from the question of taxation, which is heavily penal in amount, the trustee is faced with the certainty that the income and capital of the fund will be increasingly employed upon purposes which, though necessary having regard to the strange times in which we live, have no direct relation to the purpose for which his trust was constituted. In other words, administrative costs have risen many times in amount, whilst income yields have declined sharply. Just before the second world war there was a severe famine in Shensi, one of the remotest provinces of north-west China. The United States, with characteristic generosity, dispatched cargoes of wheat to Shanghai for the relief of famine. When it was put ashore it was placed on the railway and addressed to Shensi. Unfortunately, however, China has customs posts at provincial frontiers, and at each of these a portion of the wheat was sold to meet customs dues. The rest was found insufficient to pay the rail charges, and was therefore sold *en route*. In consequence the famine continued without American relief. The law of trusts is today approaching a comparable state. Administration costs increasingly swallow up declining revenues.

It has been pointed out that income yields from trust funds are steadily declining. The main reason for this is obviously the high rate of taxation; but other factors of almost equal importance are inflation and the low interest policy which has been followed in recent years. The full history of trustee investments has never been written. It is a chapter in the history of Great Britain's rise to the position of the world's banker, and of her rapid fall from that position in the past two decades. When the law of trusts was re-created by Lord Nottingham and his successors at the end of the seventeenth century, there existed no settled practice with regard to trustee investments. In the carefree days of Charles II a government loan would have emphatically not been a good trustee investment, and the position of trustees at this point was one of great uncertainty. Wise and honest trustees sought the advice of the Court. Others were less scrupulous, and employed trust funds in the furtherance of their own interests. This had disastrous consequences at the beginning of the eighteenth century, with the bursting of the South Sea Bubble, for we are told that one of the circumstances which aggravated the general ruin was that many trustees had yielded to the nation-wide gambling fever, and had speculated in South Sea and similar stock with funds committed to their care. The full story of the ensuing misery has never been told, but there can be no doubt that its effect upon the practice of the Court of Chancery was salutary, for the Court began to draw a sharp line between investments which it was proper for the trustee to make, and those which were not. Moreover, the Chancellors laid down the great equitable principle that a trustee may not profit from his trust, thereby removing the incentive of personal gain from the trustee's power to make investments. There can be little doubt that the chastening experience of the South Sea Bubble had a good deal to do with the stricter formulation of this rule. Thus Lord Macclesfield held in *Bromfield* v. *Wytherly,* as late as 1719,[2] that 'if an executor or trustee of money places it out in the funds, or on other security, whereby he gains considerably, he shall have the whole benefit thereof to himself, in respect of the hazard he ran of being a considerable loser thereby, which he must have borne'. It is only when the trustee is actually insolvent(!) when he invests that he may not keep the profit, since he would have been unable to satisfy the loss. This decision was on the eve of the wild orgy of speculation which drove the price of £100 worth of South Sea Stock from £130 on January 31, 1720, to £1,000 in May, and to £1,060 at midsummer of the same year. Lord Macclesfield had certainly made it easy for trustees to enrich themselves at the expense of their

[2] 1 Cas. in Eq. 398.

beneficiaries. Seven years later, however, with the full effects of the financial disaster now apparent, Lord King sternly laid down in *Keech* v. *Sandford*[3] the principle that a trustee may never profit personally from his trust, adding: 'I very well see, if a trustee, on refusal to renew, might have a lease for himself, few trust estates would be renewed to *cestuis que* use'. This was not cynicism. It was recent bitter experience.

Decisions such as this had the effect of discouraging trustees from hazarding their beneficiaries' property, whether for their own enrichment, or for any other reason. It was only gradually, however, that the complementary rule that trustees *must* put trust money in proper investments developed. In between, there was an awkward transitional period, during which trustees were not compelled to invest at all, and they often let trust money lie idle for fear of loss. Since, however, such a practice went some way towards frustrating the very purpose for which trusts were normally created, *i.e.*, the enjoyment of a number of interests in succession, it became common to incorporate into trust instruments clauses giving trustees express powers to lend out money at interest. As the eighteenth century progressed, and successive Chancellors of the Exchequer placed British finances and Government loans on an entirely new basis, Government stock at three per cent became an investment which was very much sought after. Moreover, since the Court of Chancery invested funds under its control in these stocks (which, when consolidated later in the century, became known as Consols) the rule developed that a trustee was free to invest in them, without personal liability, even without authorisation from the settlor. So began that increasingly important alliance between Government and investing middle classes, for the national benefit; an alliance which has been terminated only in our own day, as the consequence of the triumph of another conception of social organisation, *i.e.*, the so-called planned welfare State.

During the eighteenth century, however, each progressive extension of the national debt simply became an aspect of increased national wealth; and although there were Jeremiahs who darkly predicted that such an expansion of credit could not go on, British overseas trade expanded so rapidly that there was constantly an abundance of investible money seeking Government stocks, which therefore remained remarkably steady, even in temporary periods of national difficulty.

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[3] (1726) 2 Eq. Ca. Abr. 741.

In the nineteenth century there were further developments. Following the reform of English local government, by the Municipal Corporations Act, 1835, trustees were progressively encouraged to invest in the loans of municipal corporations, and later still, in those of the new county authorities. In the second half of the nineteenth century, the area of investment was extended to include the stocks of dominion and colonial governments, as well as those of the growing municipalities of the Empire. Trust money, therefore, played a part of first importance, not only in financing the wars with France in the eighteenth century, with the resulting expansion of Empire and enormous growth of commerce, but in the development of the resources of that empire, and with it the growth of self-government in the nineteenth century. The nineteenth century, however, posed one other problem of major importance for the trustee. The rapid growth of industry, made possible by the invention of the steam engine and the growth of railways, raised the question of the extent to which trustees could properly participate in these enterprises. Towards the middle of the nineteenth century there was a fever of speculation in railways which in some ways recalled the madness of the years of the South Sea Bubble. On both occasions there were enterprises which, if they had been permitted to develop normally, would have been of great service to the community. When they became pawns in a nation-wide stock jobbing boom, however, they proved unable to support the extravagant hopes which had been raised, and some of them failed. Even the surviving railways suffered from over-lavish capitalisation. This time, however, trustees were more rigidly limited in their capacity to make investments than they had been at the beginning of the eighteenth century. Statute prescribed that they could only invest in the debentures or preference shares of railways which had paid a dividend of four per cent on their ordinary shares during the preceding ten years. As far as industrial undertakings were concerned, participation by the trustee was excluded altogether, unless the settlor expressly authorised it. This probably represented the best attainable compromise between security of capital and large income yield that could be achieved. After all, the leading nineteenth century cases governing the mode of apportionment of assets between capital and income regarded four per cent as a reasonable average income from trustee investments regarded collectively. This, in an age when income tax dropped to twopence in the pound and when indirect taxation was of almost negligible proportions, was no bad yield. There were not many trustees who agreed with Timothy Forsyte that the only prudent policy was to avoid even investments permitted by successive Trustee Acts, and to limit their range to the sacred inviolability of three per cent Consols, which rose higher and higher in popular estimation as the reign of Victoria lengthened.

It used to be a commonplace among the elderly to say that things have never been the same 'since the old Queen died', and from the point of view of the trustee, this is certainly true. Wars and rumours of wars cause even 'gilt-edged securities' to fluctuate in price, but even worse has ensued. Since 1914 one of the trustee's very real embarrassments has been the impossibility of planning ahead. Income tax and allied taxes have varied constantly, usually for the worse, and death duties have progressively confiscated more and more of the fund which the trustee administered. To add to his difficulties there has been greater interference with interest yields between 1914 and 1949 than there was in the entire period from 1700 to 1914. It is true that in the second half of the nineteenth century one Chancellor of the Exchequer, Goschen, sought to take advantage of the prevailing prosperity and an abundance of money to force down the rate of interest on Government stocks from three per cent to two-and-a-half per cent, but his efforts were not well received, and they proved a failure, since the capital value of the stocks quickly slumped to the point where the real yield was again three per cent. The national effort in the first world war involved expenditure on a quite unprecedented scale, and the need for new capital was so great that the rate of interest on War Loans rose rapidly to five per cent, where it remained until the great conversion loan of 1931 reduced the rate to three-and-a-half per cent where, substantially, it remained throughout the second world war. Since 1945, however, there has been apparently light-hearted experimentation with the lower yield of two-and-a-half per cent. In so far as National Savings has been concerned, this rate has strikingly failed to attract the small investor, whilst as far as the older investing public (in which today trustees are very influential) is concerned, the 'Dalton $2\frac{1}{2}$s', as they are often called, after a short interval fell to such a point that the effective yield again became three to three-and-a-half per cent. Similar consequences have followed over-lavish issue of Government stock by way of compensation for property taken under successive Nationalisation Acts. Where these results have followed in respect of trust property, the trustee has once again been compelled to stand by whilst the capital of the trust fund is arbitrarily reduced by Government action. Thus, today Dr. Dalton's two-and-a-half per cent Treasury stock can be bought at £68–£70 for every £100 of stock, and Treasury three per cent stock has fallen from £100 to £84.

Today, therefore, the task of keeping up the fund of a private trust is one of unprecedented complexity. Indeed, it has become almost an impossible task, and in face of growing difficulties settlors have been compelled to give trustees wider powers than have been general hitherto. They are permitting them to invest in securities of any kind, provided the trustees exercise their powers in good faith, and the Courts, after initial hesitation, have now accepted the implications of this wider power to the extent that they have refrained from holding trustees liable if they act in good faith and loss ensues. Thus, there is today no doubt that a trustee has power to invest in commercial stocks and shares or in land under a clause which states that 'all moneys requiring to be invested under this my will may be invested by the trustee in any manner in which he may in his absolute discretion think fit in all respects as if he were the sole beneficial owner of such moneys'.[4] This is indeed inevitable, for if the trust extends to shares in public utilities or heavy industry, trustees will have the choice of standing by whilst the fund is reduced by the unsatisfactory terms of exchange for Government stock which appear in the Nationalisation Acts, or of selling under depreciatory conditions and then investing the proceeds in Government stock, with low income yields, and the capital value of which fluctuates dangerously in successive national crises. Even if the fund is simply invested in long-term Government stocks (as Timothy Forsyte would have wished), unless the fund is an extremely large one, the result is that no one is able to live upon the excessively diminished yields. It may perhaps be suggested that under modern political and social theories nobody should expect to live upon the produce of capital; yet even today many of the clauses of family settlements are concerned with the elderly, the widowed, the infirm, and with children. Moreover, there are other factors which must be weighed. During the past two years Parliament has considered a bill introduced for the purpose of varying the terms under which Lady Mountbatten enjoys the property bequeathed under the terms of her grandfather's will. The Cassel estate was an unusually large one, and Lady Mountbatten enjoyed an extremely large interest in it. Unfortunately for her, however, she inherited it subject to a restraint on anticipation, which meant that she could not alienate the capital or future income. She could simply spend the current income as it fell due. Although restraints on anticipation were abolished for future settlements in 1935, this Act did not affect restraints imposed in an instrument which was already in operation, and accordingly Lady Mountbatten's estate was unaffected by it. Nevertheless, although the capital value of Lady Mountbatten's estate is to be computed in millions, it was stated in the House of Commons that taxation had reduced her income from £80,000 to £4,500 a year. The object of the Mountbatten Bill was therefore to enable Lady Mountbatten to set aside the restraint on anticipation so as to use the capital of her trust fund. Eventually, however, this private bill was withdrawn, and there was introduced the Married Women (Restraint upon Anticipation) Bill—a public bill having as its object the abolition of surviving restraints on anticipation. The bill was passed on two main principles—the undesirability of preserving any remaining mark of the married woman's former subordinate status, and the hardship arising from inability to touch capital when income yields are inadequate to support the beneficiary. If the position of Lady Mountbatten, as the principal beneficiary under one of the largest trusts of modern times, was what it was stated to be in the House of Commons on the second reading of this bill, what is the position with regard to family trusts of persons of ordinary means?

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[4] *Re Power's Will Trusts* [1947] Ch. 572.

When the problem is seen in these terms it will be apparent that the law of trusts is today grappling with a problem which goes to the roots of our social existence. In the past the prosperity of these islands has depended to a substantial degree upon the prudence and foresight of successive generations of investors, of whom trustees, whether private or charitable, were an important—perhaps the most important—element. The prosperity arising from their investments was two-fold. On the one hand it ensured the availability of an adequate supply of capital for the development of public services in this country, the Dominions and Colonies. Moreover, the long-term investment which is possible, and even desirable, for trustees, was an important steadying factor in times of war or national crisis. On the other hand, the possibility of secure investment, with fixed and low income yields was an instrument for giving the steadily-expanding middle class a stake in the country, and for providing the means whereby that class provided for the education and maintenance of its children, and for the support and comfort of its older members. These habits were of long standing, and in so far as they were induced by the machinery of the law of trusts, they date from the Revolution of 1688 at the latest. Today, however, the edifice which has been laboriously built up is in danger of collapsing. There is no longer any certainty that the desired ends can be achieved, nor can the trust be preserved for a prolonged period. The alliance between the State's welfare and the thrift of its most industrious members has been preserved to such a degree that there is real danger that it may not survive at all; and it is no accident that, as these ominous changes have taken place, national economic difficulties have increased. It may be, of course, that present policies will be pursued to the point where private property itself ceases to exist as a considerable factor in social organisation. If that should be the case, then this address would be no more than an illustration of the means whereby that revolutionary change is being achieved. If, on the other hand, national recovery is to be sought along less drastic lines, then the desirability of maintaining the trust as a social institution, and of simplifying the task of the trustee in the course of his administration is evident.

3

ANACHRONISMS IN EQUITY

O. R. Marshall

HISTORICAL OUTLINE

The story of equity is writ large with anachronisms. The story begins in the fourteenth century after the common law had been in existence for some two hundred years. For some time after its inception the development of the common law had been unrestricted. New writs could be issued to meet new cases. But in 1258 the Provisions of Oxford put a stop to that, and though the opportunity of further development was partly restored by the Statute in Consimili Casu of 1285, other factors had arisen to make the intervention of equity a necessity. These factors were, first, the turbulence of the times—a plaintiff though legally entitled to a remedy might fail to obtain redress owing to the defendant's defiance of the court or his intimidation of the jury and, secondly, the inadequacy of common law remedies—except in the case of the real actions common law offered only damages, whereas equity could and did provide specific performance and injunction. Accordingly the practice developed of referring cases, which were affected by the presence of either of these factors, to the King in Council for the exercise of his extraordinary judicial powers, for though the King had established the common law courts, he was still the fountain of justice and by virtue of his prerogative he could hear petitions from his subjects. Later the practice grew of referring these petitions to the Chancellor, at this time usually an ecclesiastic, and in 1474[1] he made a decree in his own name instead of in the name of the King. From this time we can say that there is a separate Court of Chancery.

I must here digress for a moment. The notion of equity is not peculiar to any one system of law. Thus in Roman law the *jus civile* (law based on statute) has been compared with common law and the *jus honorarium* (law based on the magisterial edict) has been compared with equity. The one mitigated the rigour and hardship of the other. English equity does the same, but its peculiarity lies in the fact that whereas in Roman law the *jus honorarium* was administered in the same courts as the *jus civile,* in English law equity was administered by the Court of Chancery, and common law by the Courts of King's Bench, Common Pleas, and Exchequer. This indeed is the main distinguishing feature of English equity, and Maitland pointed it out most clearly when he defined equity as 'that body of rules administered by our English courts which, were it not for the operation of the Judicature Acts, would be administered by those courts which would be known as Courts of Equity'. In other words the spirit of equity is universal, but its mode of administration in England was peculiar to English law.

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[1] It is possible that this jurisdiction existed earlier; see Potter, *Historical Introduction to English Law* (2nd ed.), p. 137.

To return to the main story. English equity in the Middle Ages was undefined. The Chancellor would intervene in particular cases on the ground of conscience—an unsatisfactory basis for intervention since, as Selden pointed out, conscience was a roguish thing and was likely to vary with each Chancellor even as his foot. This is probably an overstatement. The Chancellors of the period kept equity fluid and applied a clearly understood body of principles (from which a number of equitable doctrines have been derived). The sting of the gibe lies in the fact that they rejected the writ system and the 'magic' of decided cases. This situation did not last. England during the Tudor period returned to an era of stable government with the result that the opportunity for the intervention of equity on the ground of the turbulence of the times disappeared. It was in this period, too, that the protection of the 'use' by the Court of Chancery was severely limited by statute.[2] With its own child kidnapped, equity plays the foster-mother to the common law. It claims to be able to restrain a litigant from relying on his common law rights if it would be against conscience for him to do so. A good example of this is to be found in the fact that equity gave relief against penalties in bonds, whereas common law permitted them to be enforced according to their terms. It was natural that in the eyes of the common lawyer equity should bear a resemblance to a Jack o' the Beanstalk making periodic raids upon the

[2] The Statute of Uses, 1535.

giant's castle. The struggle between the courts was a lengthy one, and matters came to a head in the reign of James I in the *Earl of Oxford's Case*.[3] The issue was whether the Court of Chancery had power to prevent a plaintiff who had secured judgment at common law from proceeding to the execution of that judgment. Neither Coke for the common law courts nor Ellesmere for the Chancery was prepared to give way. Reference was made to the King who, acting upon the advice of Bacon, his Attorney-General, ordered the Chancellor to continue to give such relief in equity 'as shall stand with the merit and justice of their cause, and with the former, ancient and continued practice and presidency of our Chancery'. This direction was not free from ambiguity, but it set the royal seal on the right of the Court of Chancery to exist, and it limited its jurisdiction to matters hitherto annexed by the Chancellors. Equity was soon to come under attack from another angle, for throughout the long struggle between Parliament and the King in the seventeenth century it suffered from the effects of its conciliar birth. Indeed the Court of Chancery was often linked with the Star Chamber and threatened with extinction, but it survived this threat and it emerged from the Restoration much chastened but secure as part of the legal heritage of England. The Restoration marks a distinct period in the story of equity. Henceforth all the Chancellors are lawyers, and a long line of distinguished men lay the foundations of modern equity. Equity's kidnapped child, the 'use', is returned to it[4] and renamed the 'trust'. Trusts are classified[5] and detailed rules governing their administration are worked out. Secret trusts emerge in the Chancellorship of 'Judge Jeffreys'. The nature of the Equity of Redemption[6] and the Modern Rule against Perpetuities[7] are enunciated. The rules relating to the award of a decree of specific performance are settled.[8] Lord Thurlow introduces the conception of the restraint upon anticipation (an anachronism which statute has removed from the scope of this paper)[9] and Lord Eldon propounds the trustee's duty of impartiality between successive beneficiaries.[10] Throughout this period, equity is being systematised, and by the end of the Chancellorship of Lord Eldon in 1827 it has become a technical equity far different from the natural justice of the medieval period. The year 1827 may be said to mark the end of the creative period of equity. Future development has been mainly due to legislation; the nineteenth century saw the passing of the Judicature Act which fused the administration of law and equity in the Supreme Court of Judicature, though it did not create a uniform body of law; and in the twentieth century there emerges from the Property Legislation of 1925 a new kind of statutory equity. Indeed equity may now be said to have entered upon what Professor Hanbury calls a 'somewhat mechanical phase'.[11]

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[3] (1615) 1 Rep.Ch. 1.

[4] The earliest reported case is *Sambach* v. *Dalston* (1634) Tothill 188, though the Court does not appear to have regarded the decree as in any way novel. However, development belongs to the post-Restoration period.

[5] *Cook* v. *Fountain* (1676) 3 Swanst. 585, at p. 591.

[6] *Harris* v. *Harris* (1681) 1 Vern. 33.

[7] *Duke of Norfolk's Case* (1677) 2 Swanst. 603.

[8] *Cuddee* v. *Rutter* (1720) 1 P.Wms. 570; cf. *Pusey* v. *Pusey* (1684) 1 Vern. 273.

CONCLUSIONS TO BE DRAWN THEREFROM

Even this scant historical outline permits us to draw some conclusions. First, it will be apparent that the rules of equity have no history of continuous development in any way comparable to the rules of common law. The rules of equity arose to meet the social needs of a particular age. As Sir George Jessel observed in *Re Hallett, Knatchbull* v. *Hallett*,[12] 'The rules of Court of Equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time, altered, improved and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellor who first invented them and state the date when they were first introduced into equity jurisprudence; and therefore, in cases of this kind, the older precedents in equity are of very little value.

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[9] Married Women (Restraint Upon Anticipation) Act, 1949.

[10] *Howe* v. *Dartmouth* (1802) 7 Ves. 137.

[11] *Modern Equity* (5th ed.), p. 1.

[12] (1880) 13 Ch.D. 696, at p. 710.

The doctrines are progressive, refined, and improved; and if we want to know what the rules of equity are we must look, of course, rather to the more modern than to the more ancient cases'.

It seems, however, that in the mechanised phase which equity has now entered it is no longer possible to invent a jurisdiction for the first time. So in *Re Diplock*[13] it was said that 'if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time'. This attitude enabled the Court of Appeal to reverse Wynn-Parry, J.,[14] (with regard to the remedy *in personam*) solely on the ground that he had begun his citation of authorities in 1826,[15] whereas they were able to put the clock back to 1669,[16] and this despite the fact that the *raison d'être* of the earlier cases was the rivalry in regard to the administration of the estate of deceased persons between the Courts of Chancery and the Spiritual Courts—a reason which no longer exists.

Secondly, the introduction of the doctrine of the single binding judicial precedent into the sphere of equity jurisprudence hamstrung its purpose, which was the mitigation of the rigour and hardship of the law. Some systematisation of equity was, without doubt, both desirable and inevitable. But it may be questioned whether the need of certainty is so strong as to justify the complete rejection of conscience as a ground for equitable intervention. And though there may be virtue in uniformity of rectitude, there can be no apology for uniformity of error. Yet this has been the unfortunate result of a too rigid application of the doctrine of precedent to the sphere of equity. It has caused the perpetuation of error, the negation of conscience and the projection of rules which were invented to meet the needs of a bygone era into an age for which they are no longer appropriate. It might be thought that the Judicature Act, 1873, which removed certain outstanding conflicts and reformed the organisation and procedure of the courts would have witnessed the rebirth of equity. And indeed there have been some attempts to restate principles of law and equity in the light of their combined effect[17] with the inconsistencies removed and the reconciliation of the irreconcilable ignored or by-passed. But taken by and large these attempts are mere isolated instances of the spirit which rebels against technicality for technicality's sake, and which sees no virtue in preserving the shadow when the substance is gone. It must, therefore, be admitted that the arteries of equity have hardened and that her capacity for recuperation no longer depends on her own youthful vigour but rather on a series of major operations by the legislature. For my part I think that new vigour could be introduced by a modification of the rigid doctrine of precedent, but if we take things as they are it must be admitted that statute is today the main instrumentality of law reform. It is time, therefore, that the attention of the legislature should be drawn to a number of anachronisms which are today outmoded but nevertheless continue to plague our equity jurisprudence.

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[13] [1948] 2 All E.R. 318, at p. 326; cf. *Hurst* v. *Picture Theatres, Ltd.* [1915] 1 K.B. 1, from which there emerges a sort of 'bastard' equity, if attention is paid to the precedents alone.

[14] [1947] 1 All E.R. 522.

[15] *Gillespie* v. *Alexander* (1827) 3 Russ. 130.

[16] *Nelthrop* v. *Hill* (1669) 1 Cas. in Ch. 135.

EQUITABLE ANACHRONISMS

The rule in Lawes v. *Bennett*

The list of anachronisms which I am going to consider is not exhaustive. First on the list is the equitable doctrine of conversion. Dr. Kiralfy has recently inveighed against the penal consequences of this doctrine,[18] and I do not intend to traverse all the ground which he has so adequately covered. I must, however, underline and emphasise one aspect of this outmoded conception, namely, the rule in *Lawes* v. *Bennett*[19]—that spurious product of the union between the doctrine of conversion and the judicial ingenuity of Kenyon, M.R., who decided it, or rather of Lord Eldon who argued the case before him. The case is this.[20] . The owner of the fee simple estate in Blackacre makes a will in which he devises his realty to X and bequeaths his personalty to Y. He then demises Blackacre to you for a term of twenty years with an option to purchase the freehold within six months after his death. He dies before the expiry of the lease and you exercise the option within the specified time. Two questions at once arise—first, who is entitled to the rents and profits of Blackacre during the interval between the testator's death and the date of your exercise of the option and, secondly, who is entitled to the purchase money which you will pay to the testator's executors? It was decided in *Townley* v. *Bedwell*[21] that the rents and profits went to the devisee, X, but in *Lawes* v. *Bennett*[22] that the purchase money went to the legatee, Y. 'Why', said Romer, L.J., in *Re Carrington*,[23] 'the exercise of the option should have the effect of taking away the real estate from the person to whom it has been devised and giving it to the person who has the personal estate is what I have never been able to understand'. And there is a very good reason why this should not be the result, for until the option is exercised there is no contract of which equity would grant specific performance. This does not mean that there is no contract at all in existence. The recent case of *Wright* v. *Dean*[24] is proof enough of that. It was there held that the owner of a fee simple estate in Blackacre who granted his lessee an option to purchase the freehold was liable in damages if he had put it out of his power to convey the freehold when the option was exercised. In that case before the option was exercised the owner had conveyed the freehold reversion to a purchaser who took free from the option because it had not been registered as an estate contract under the provisions of the Land Charges Act, 1925. In those circumstances specific performance could not be decreed against the purchaser, but substantial damages were awarded against the owner. The fundamental fact remains, however, that there can be no question of an award of specific performance until the exercise of the option, and as the doctrine of conversion is ostensibly derived from the maxim that 'Equity regards as done that which ought to be done',[25] it is incontrovertible that the date for the application of the notional conversion should be the date on which the option is exercised and not the date on which it is granted. It is interesting, therefore, to see what reasons have been judicially advanced for the choice of the latter date to the complete disregard of equitable principle. These reasons are epitomised in the cases of *Re Isaacs*[26] and *Re Marlay.*[27] The first case merely restates the effect of the earlier decisions, and one is left with the conviction that an explanation has been offered which in fact explains nothing. 'In other words', said Chitty, J.,[28] 'in these cases there is a conversion, by virtue of the contract, of the testator's real estate into personal estate as between his real representative and his personal representative, but the conversion operates for all purposes only from the time when the option itself is exercised. That is necessarily the principle of the decisions, because in them it was held that the rents went to the heir'. The second case is little better, for it fails to explain why the exercise of the option should have retrospective effect. 'I think', said Warrington, L.J.,[29] 'in such cases the land passes on the death to the heir or devisee as realty for an estate defeasible on the happening of the event which renders the contract binding and that on the happening of that event and not till then the land is converted into personalty'. And Cozens-Hardy, M.R.,[30] uses almost identical language. But it is difficult to see why the exercise of the option should take away the purchase money from the devisee since it would certainly not have had this effect with regard to the testator himself had the option been exercised during his lifetime. Furthermore, this principle conceals a hidden danger. For if it were strictly applied it would lead to the incongruous result that the testator had unwittingly created a settlement under the Settled Land Act, 1925, though this would obviously be contrary to his intention. To put a hypothetical case. A testator makes his will by which he devises his realty to X and bequeaths his personalty to Y. He then demises his freehold estate Blackacre to Z for a term of ninety-nine years with an option to purchase the freehold reversion at any time during the continuance of the lease, but in any event not later than twenty-one years from the date of the testator's death.[31] The option is not exercised during the testator's lifetime, and on his death the estate in fee simple in Blackacre devolves on his personal representatives. If we assume that the lease has more than twenty-one years to run and that the option is not exercised during the 'executor's year' the position of the personal representatives would appear to be as follows:

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[17] *E.g.*, *Nelson* v. *Larholt* [1947] 2 All E.R. 751.

[18] 'The Penal Consequences of the Equitable Doctrine of Conversion' (1949) 13 *The Conveyancer and Property Lawyer*, pp. 362–372.

[19] (1785) 1 Cox 167.

[20] I have chosen a case in which the rule does apply. When, however, the grant of the option precedes the will the rule is excluded. See *Drant* v. *Vause* (1842) 1 Y. & C.C.C. 580; *Emuss* v. *Smith* (1848) 2 De G. & Sm. 722.

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[21] (1808) 14 Ves. 591.

[22] (1785) 1 Cox 167.

[23] [1932] 1 Ch. 1, at p. 17. In any event this case was wrongly decided as it did not involve conversion from realty into personalty. As a Court of Appeal decision, however, it is binding upon the High Court; see *Re Rose* [1948] 2 All E.R. 971.

[24] [1948] 2 All E.R. 415.

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[25] I have known an examinee preface his Equity paper with this caption.

[26] [1894] 3 Ch. 506.

[27] [1915] 2 Ch. 264.

[28] [1894] 3 Ch. 506, at p. 509.

[29] [1915] 2 Ch. 264, at p. 281.

[30] At p. 275.

(1) The devisee, X, is not entitled to an absolute interest, but only to an estate defeasible upon the exercise of the option which at the same time carries the interest over to the legatee, Y.

(2) This creates a settlement within section 1 (ii) (b) of the Settled Land Act, 1925, which provides that a settlement for the purposes of the Act exists where (*inter alia*) land is limited in trust for any person in possession for a fee simple or term of years absolute subject to a gift over on failure of issue or in any other event.

(3) The devisee, X, is a tenant for life for the purposes of the Settled Land Act within section 20 thereof, which provides (*inter alia*) that a person entitled in possession to a legal estate subject to a gift over on failure of issue or any other event shall have the powers of a tenant for life.

(4) The personal representatives may not wish to hold up administration pending Z's decision whether to exercise the option or not.[32]

(5) In that event, and if the above analysis is correct, they should vest the legal estate in Blackacre in X as tenant for life for the purposes of the Settled Land Act, and trustees of the settlement should be appointed.

(6) If Z exercises the option while X still holds the land, X will convey it to him and the purchase money will

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[31] This is to ensure that the option does not infringe the Rule against Perpetuities.

[32] In the usual case the option is made exercisable within a year of the testator's death.

be paid to the trustees of the settlement who will pay it to the legatee, Y.

(7) If X sells the land to a third party before the option is exercised, as he is entitled to do, he should take care to make the third party take subject to the option. Otherwise he will be liable in damages.[33] But even if X does this, the purchase money which the third party pays will be handed to the trustees of the settlement who will invest it and pay the income to X until the option is exercised. The capital will then be paid to the legatee, Y.

(8) If the option is not exercised the settlement comes to an end. X will then be able to demand that the trustees of the settlement should execute a deed of discharge declaring that the land is free from the trusts of the settlement.[34]

This is a logical deduction from an illogical premise—a *reductio ad absurdum.* But if there is even the shadow of a suggestion that the elaborate machinery of the Settled Land Act can be called in aid of the doctrine in *Lawes* v. *Bennett*[35] it is time that the doctrine itself be eradicated from the sphere of equity jurisprudence which it has disgraced too long.

Half-secret trusts,[36] the rule prohibiting communication subsequent to the will

Secret trusts depend for their validity upon the application of the maxims that 'Equity will not allow a statute to be used as an instrument of fraud' and that 'Equity acts *in personam*'. Accordingly, if a testator bequeaths a legacy of £1,000 to X who agrees to hold it on trust for Y, X cannot after the will has come into effect claim the legacy beneficially for himself. For to plead the Wills Act, 1837, in his defence would be tantamount to committing a fraud, and equity will interpret the statute so as to avoid this result. 'A Court of Conscience', said Lord Sumner in *Blackwell* v. *Blackwell*,[37] 'finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. . . . The necessary elements, on which the question turns, are intention, communication and acquiescence. . . . For the prevention of fraud, equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with, it lets him take what the will gives him and then makes him apply it, as the Court of Conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual'. The principle that the trust operates outside the will was taken to its extreme limits in *Re Gardner*,[38] in which it was held that the interest of a beneficiary who survived the communication but predeceased the testator did not lapse (as it would have done had the trust been a testamentary one) but was payable to the beneficiary's personal representatives as part of his estate. But it is difficult to see how a completely constituted trust can arise from the date of the communication, since there is at that date no property vested in the trustee-legatee. And if the trust were completely constituted it would deprive the testator of his power to revoke it, which can hardly be the case. Accordingly, it is submitted that the decision in *Re Gardner* must be read subject to the following reservations: (1) the testator is free to revoke the communication; he can, so to speak, unburden the conscience of the legatee-trustee; (2) the testator can during his lifetime treat the legacy in the same way as if it were specifically bequeathed to the beneficiary; he may use it for his own purposes, and he may dispose of it either by way of gift or for valuable consideration; (3) if the testator dies without having changed his mind or without having otherwise disposed of the fund, it will vest in the beneficiary or form part of his estate, but even so, it will be treated as having been

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[33] *Wright* v. *Dean* [1948] 2 All E.R. 415. The effective method of doing this is to register the option as an estate contract under the Land Charges Act, 1925.

[34] Section 3 (b), Settled Land Act, 1925.

[35] (1785) 1 Cox 167.

[36] Snell's phraseology. The contrast is between the fully-secret trust, *i.e.*, where neither the existence of the trust nor the identity of the beneficiaries is disclosed by the will, and the half-secret trust, *i.e.* where the existence of the trust is indicated but the identity of the beneficiaries is not.

[37] [1929] A.C. 318, at p. 334.
[38] [1923] 2 Ch. 230.

specifically bequeathed in so far as the payment of debts is concerned.[39] But even with these reservations the case is clear authority for the proposition that a secret trust is not a testamentary one; rather, it arises by virtue of the personal obligation which the legatee has undertaken and upon which the Court of Conscience fastens. Why then should the Court of Conscience disregard this principle when the case is one in which the legatee takes as trustee on the face of the will and the objects are disclosed by a communication subsequent to the making of the will? Surely it is as competent to the trustee-legatee to undertake a personal obligation after the making of the will as it is before it; and this is exactly the principle on which the courts have decided cases of fully-secret trusts. The limiting factor in both types of case is the inability of the legatee to accept an obligation which is made known to him for the first time after the testator's death.[40]

On what principle, then, have the courts differentiated between the fully-secret trust, in which the testator may disclose the objects at any time during his lifetime, and the half-secret trust in which he must do so before or at the same time as the making of the will. The reason judicially advanced for the difference is not convincing. 'A testator', said Lord Sumner in *Blackwell* v. *Blackwell*,[41] 'cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards. . . . To hold otherwise would indeed be to enable the testator to "give the go-by" to the requirements of the Wills Act, because he did not choose to comply with them'. This was a mere *obiter dictum* but it has been applied in *Re Keen*[42] by the Court of Appeal and *Re Jones*[43] in the court of first instance, though both of these cases are explicable on other grounds—*Re Keen* on the ground of repugnancy to the express provisions of the will and *Re Jones* on the ground of incorporation by reference. A bad reason, however, remains bad no matter how often it is applied, and this is a bad reason. For the same argument can be used to negative the validity of fully-secret trusts where the objects are disclosed after the making of the will. Yet the validity of fully-secret trusts has never been called in question, whatever the time of communication provided that it takes place during the testator's lifetime. Though the maintenance of the distinction does violence to equitable principle it can perhaps be justified on empirical grounds. It may well be that the courts have grown afraid of the weapon which they themselves have forged.[44] They permitted a *post mortem* trust to be created[45] outside the provisions of the Statute of Frauds (the precursor to the Wills Act in this respect) at a time when the doctrine of the supremacy of Parliament was not the commonplace which it is today, and when equity was still the major instrumentality of the development of law. With the establishment of this doctrine, however, and the emergence of a technical equity, there has been a judicial tendency to restrict the development of the principles of secret trusts. The seventeenth-century judges opened the gates of equity to admit a principle, which their twentieth-century brethren cannot eject, but which they can and do restrict.

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[39] *Re Maddock* [1902] 2 Ch. 220 (C.A.).
[40] *Re Boyes* (1884) 26 Ch.D. 531; *Re Colin Cooper* [1939] Ch. 580.
[41] [1929] A.C. 318, at p. 339.
[42] [1937] Ch. 236.
[43] [1942] Ch. 328.

Trusts of Choses in Action

The situation is this: A, the promisor, makes a contract with B, the promisee, for the benefit of C, the third party. C is neither a party to the contract, nor does he himself provide any consideration to support A's promise. The question is whether C can enforce the promise made in his favour. The results of the authorities appear to be as follows:—

(1) *At Common Law*

(a) The contract between A and B must be an enforceable one, that is to say, it must either be made under seal or for valuable consideration.

(b) A can perform the contract according to its terms. In this case C derives the benefit personally. He is not required to account to B either at common law or in equity.[46]

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[44] Cf. the arguments of counsel in *Young* v. *Sealey* [1949] 1 All E.R. 92 (a case in which the donee was intended to take whatever was standing to the joint bank account of himself and the donor at the date of the donor's death).

[45] The earliest reported case is *Crook* v. *Brooking* (1688) 2 Vern. 50.

[46] *Re Stapleton-Bretherton* [1941] Ch. 482; *Re Schebsman* [1944] Ch. 83.

(c) B can, if he so wishes, enforce the contract, but according to *West* v. *Houghton*[47] he will only recover the nominal damages which is all that he has suffered.

(d) C cannot invoke the machinery of the common law in his own right,[48] unless he is an undisclosed principal on whose behalf B entered into the contract.[49]

(2) *In Equity*

(a) If C is a beneficiary under a perfectly constituted trust, it matters not that he is a volunteer.[50] If, however, the trust is to be regarded as perfectly constituted it can only be on the ground that B is a trustee of the benefit of his contract with A. The objection to this is that every trust requires certainty of subject matter, and as no specific property has been appropriated to the performance of the contract, the theory of a perfectly constituted trust cannot be supported.

(b) If C is to get assistance from equity it must be by way of exception to the maxim that 'Equity will not assist a volunteer', for generally speaking, a volunteer cannot enforce a mere promise to create a trust in his favour.[51]

(c) Equity affords this assistance in certain cases, which may be subdivided as follows:—

(i) *Cases in which B expressly contracts with A as trustee for C*

Here one must mark off the 'next-of-kin' cases as being in a category by themselves. If A on the occasion of his marriage covenants with B to transfer after-acquired property to B as trustee in the first instance for the parties to, and the issue of, the marriage with an ultimate trust in favour of the next-of-kin, then if on the failure of the preceding trusts C happens to be sole next-of-kin he cannot enforce the promise to make the necessary transfer.[52] Indeed equity will go so far as to direct

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[47] (1879) L.R. 4 C.P.D. 197.

[48] *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393; *Dunlop* v. *Selfridge* [1915] A.C. 847.

[49] See Anson on *Contract* (19th ed.), pp. 391 *et seq.*

[50] *Ellison* v. *Ellison* (1802) 6 Ves. 656.

[51] See *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264.

[52] *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609.

B not to take the necessary action on C's behalf.[53] The reason for this is probably that next-of-kin are not deserving of the assistance of the court in this respect inasmuch as they are not the immediate objects of a marriage settlement, but are a mere afterthought. If, on the other hand, A expressly covenants with B as trustee in the first instance for C, then C can enfor performance of the covenant in his favour, and his right is n limited to recovery of the merely nominal damages which B has suffered.[54] The strength of the declared trust is sufficient to override the objection that C is a volunteer.

(ii) *Cases in which A contracts with B for the benefit of C but no trust is mentioned in the contract*

Even when no trust is mentioned in the contract, equity may in an appropriate case hold that a trust was intended and treat C as a *cestui que trust*.[55] The difficulty in the way of carving a trust out of what is essentially a contractual relationship is the fact that the contract between A and B would in the ordinary way not be immutable; it could be discharged or varied by mutual consent. The court must therefore be satisfied that it was the intention of the parties to the contract to fix their rights and liabilities beyond recall before they will hold that a trust has been created.[56] And in the nature of things this will generally have the effect of casting an impossible burden of proof upon the person alleging to be *cestui que trust*.

The position, therefore, is that a third party to a contract gets no assistance at common law, subject to the one exception which I have already mentioned, and that his position in equity though more hopeful in theory is little better in practice except for the *Fletcher* v. *Fletcher*[57] type of case. Nevertheless it is generally accepted that the present inconsistencies, conflicts and

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[53] *Re Kay's Settlement* [1939] Ch. 329.

[54] *Fletcher* v. *Fletcher* (1844) 4 Hare 67. Of course if C is himself a party to the covenant and a direct covenantee under it he will not need the assistance of a court of equity but will enforce the covenant at common law in his capacity as covenantee. *Cannon* v. *Hartley* [1949] 1 All E.R. 50.

[55] *E.g. Gregory and Parker* v. *Williams* (1817) 3 Mer. 582; *Re Flavell* (1883) 25 Ch.D. 98; distinguished in *Re Greene* [1949] 1 All E.R. 167; *Harmer* v. *Armstrong* [1934] Ch. 65.

[56] *Van Depitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70; *Re Schebsman* [1944] Ch. 83.

[57] (1844) 4 Hare 67.

5

THE CHANGED RELATION OF LANDLORD AND TENANT

Dennis Lloyd

It is fashionable at the present-day to dwell sometimes with nostalgic longing and sometimes with complacency on past social conditions which still remain easily within living memory but are no more for us today than symbols of a bygone social order. As an introduction to the branch of law with which I am concerned in this paper let us begin by considering the legal position of a landlord and his tenant on the eve of the First World War. The subject of the letting is perhaps a small dwelling-house in a London suburb whose rateable value is £15 a year and the landlord proposes to grant the tenant a weekly tenancy at a rental of ten shillings a week. What then were the essential features of the relationship between the parties? Firstly, there were what we may call the 'four freedoms' of the landlord. He could accept or reject any tenant he chose. He could charge any rent that a tenant was willing to pay. He could grant a tenancy of any length the tenant was willing to take and on its due determination could recover possession, if necessary, by an action in the courts. And further he could impose any terms as to the conditions of the letting, the only limit being the refusal of a tenant to accept the burden. The tenant for his part was free in the legal sense to take or decline the tenancy and to persuade the landlord, if he could, to accept particular stipulations in the lease. In the absence of these the tenant's rights were governed by the common law, which gave him no claim or standing of any kind on the determination of his tenancy. Reverting to the example I have already propounded, the landlord in such a case could serve a week's notice to determine the tenancy, and on its expiry the tenant would become a mere trespasser and liable to be summarily ejected. Alternatively on the expiry of the tenancy there was nothing in law to stop the landlord granting a new tenancy either to the old tenant or to a new one at a higher rent or at a premium. In the absence of express stipulations as to repairs the landlord would have no liability whatsoever as to these towards his tenant. The tenant, on the other hand, would be bound to keep the premises wind and water tight and keep and yield them up in a tenantlike manner.[1] Also the tenant, if the lease contained no clause prohibiting him from doing so, would be entitled to assign his lease or sub-let the premises even without the consent of the landlord, but this right would hardly be of much value in the case of a weekly tenant. Had the tenancy been one for a fixed period, *e.g.*, seven years, there would almost certainly have been a written lease which would have contained a clause either forbidding all parting with possession of the premises absolutely, or without the consent of the landlord.

Such then is the picture of one aspect—and not an unimportant one—of those pre-1914 days. Virtually complete contractual freedom and the choice of terms left to the dictates of the economic market. Not that we must under-estimate the force and value of the operation of the law of supply and demand. The inter-war period created an intense distrust of the draconic nature of this law and its uncontrolled workings, but we are perhaps beginning once again to sense that within some limits it is not without utility. The landlord was free to select his tenant and impose his own terms, but if he sought to demand a rent beyond the economic one or to impose unusually onerous terms his premises would probably remain vacant and the tenant would go elsewhere. The tenant, on the other hand, was free to take the premises or leave them and to decline to accept any terms, including the amount of a rental which he thought to be excessive.[2] It must be admitted that some part of this freedom was to say the least illusory, for the tenant could only pick and choose among such properties as were available for letting at a rental within his means and the economic and social conditions of the times limited the cheaper class of lettings to a very uniform type. Theoretically the competition of the free market operated in housing as in other things, but there seems in fact to have been little competitive urge to attract more tenants by offering them a better class of property without an increase of rent.

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[1] *Anworth* v. *Johnson* (1832) 5 C. & P. 239; *Marsden* v. *Heyes Ltd.* [1927] 2 K.B. 1. But cf. Halsbury, *Laws of England*, Hailsham ed., Vol. 20, pp. 199–200.

[2] PEP have expressed the view that 'there is reason to believe that many of the tenants at present protected would be capable, save in circumstances of exceptional scarcity, of striking a good bargain for their housing' (see PEP broadsheet on *Rent Control Policy*, November 7, 1949, at pp. 135–136—this pamphlet is referred to hereinafter as *RCP*).

It requires no emphasis that the third of a century between those days and the present has witnessed a major social revolution. Many of the ideas that seemed as natural to the pre-1914 generation as the air they breathed now possess a faintly archaic aspect. In the legal sphere few of such ideas have undergone a more radical transformation than that quaint Victorian relic, freedom of contract. We have just withdrawn a specimen from the museum of outmoded ideas and examined it lingeringly. Now let us pause to see the streamlined model that has replaced it in our time. What of the landlord's ' four freedoms '? His right to select the tenant of his choice *in the first instance*[3] alone remains in anything resembling its former amplitude. Even here, however, there are limitations to be noted. His premises may have been compulsorily requisitioned by the local authority and let[4] by them to a tenant of their own choosing. He may not even be able to let them at all for restrictions under the Town Planning Acts may prevent their being let for the only purpose for which they are in fact economically suitable. Of the other freedoms there remain scarcely a trace. The rent the landlord can charge will be governed, unless the premises have never been let before, by the amount of the standard rent, which may well depend on the amount charged in 1914 or even earlier.[5] Consequently if the premises on August 3, 1914, were actually let at ten shillings weekly that may be the limit of the recoverable rent, apart from certain statutorily permitted increases, that he can charge today, even though the premises in the 'free' market are worth five times that sum.[6] The length of the term granted has become almost immaterial since a mere weekly tenancy may amount to a lease until death and even thereafter, if the tenant dies leaving a widow or some member of his family residing on the premises.[7] And although the landlord still retains some freedom in his choice of terms which the lease is to contain there are very important restrictions upon this right. Thus if the letting is one to which the Rent Acts apply no agreement or covenant can evade their operation,[8] and if the standard rent has been fixed by an earlier letting no fresh burdens can be imposed upon the tenant without a proportionate reduction of the rent.[9] Further, other legislation has in many cases imposed upon the landlord inescapable obligations regarding the keeping of the premises fit for habitation.[10] Turning to the tenant, his position has now become a most favoured one but also one which bristles with legal anomalies. In the first instance he cannot be compelled to pay more than the standard rent and can recover any overpayments made during the two years preceding his claim to a refund.[11] Any stipulations over and above those in the letting which fixed the original standard rent entitle him to an abatement in the rent payable.[12] But such restrictions without security of tenure would be of little value to a tenant who might easily be made to accept illegal conditions in order to escape eviction. Consequently the tenant of a dwelling within the Rent Acts—whose control extended to over ten million houses at the outbreak of the recent war[13] and probably extends to an even greater number at the present day[14]—is given virtually complete security of tenure. Thus after the contractual tenancy has ended the landlord can only recover possession in the limited class of cases provided by the Acts, and even then only if he can persuade a county court judge that it is reasonable to make the order.[15] On the other hand the right to retain possession of the so-called 'statutory tenant'—who is holding the premises under the protection of the Acts—is good against the whole world[16] and yet a merely personal right of occupation which cannot be assigned or transmitted,[17] and which may be lost by the tenant ceasing to reside on the premises.[18] Nor can such a tenant sub-let the whole of the premises, but strangely enough he can sub-let a part,[19] though if he charges his sub-tenant a rent in excess of the recoverable rent his own landlord may recover possession against him.[20]

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[3] An absolute covenant against assignment or sub-letting is still valid, but a covenant not to assign or sub-let without the landlord's consent is subject to a statutory term that such consent will not be unreasonably withheld (Landlord and Tenant Act, 1927, s. 19).

[4] Technically the requisitioning authority has power only to grant a licence not a lease (see *Minister of Agriculture* v. *Matthews* [1949] 2 All E.R. 724) but the practical result is the same.

[5] Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (i) (a). The various Rent Acts will hereafter be cited for convenience as 1920 Act, etc.

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[6] *Davies* v. *Warwick* [1943] K.B. 329 (previous letting in 1916 at 4s. 3d. a week held to fix the standard rent on a reletting in October 1939. The instance given is of course assumed to be within the financial limits of the Rent Acts. In the case of houses controlled by the 1939 Act the material date is September 1, 1939.

[7] 1920 Act, s. 12 (1) (g).

[8] *Barton* v. *Finchman* [1921] 2 K.B. 291.

[9] 1920 Act, s. 2 (3).

[10] *E.g.* Housing Act, 1936, s. 2.

[11] 1920 Act, s. 14 (1), as amended by 1923 Act, s. 8 (2), and 1938 Act, s. 7 (6).

[12] 1920 Act, s. 2 (3).

[13] See report of Ridley Committee on Rent Control [Cmd. 6621], p. 7.

[14] Cf. *RCP.*, p. 128.

No more conspicuous illustration could be sought of the reverse of the trend which some nineteenth century jurists claimed to detect as the inexorable march of legal progress: that freedom of contract was the great goal towards which progressive society was moving. Contract, on this interpretation, was the basic mechanism of development in modern law. 'There was no God but contract and Sir Henry Maine was its prophet'.[21] The age of the free market is over—even in those jurisdictions which still view it as an ideal to be aimed at freedom of contract has undergone almost the same eclipse as in the state-interventionist countries of Europe. Yet it would be unwise to leap to the opposite extreme of assuming that future developments must necessarily be along existing lines. Nominally, for example, the changed relation of landlord and tenant derives solely from the housing shortage which has been with us persistently since the 1914 war. Even now the Rent Acts are in the form of emergency legislation ready to be repealed *en bloc* as soon as the hoped for change in the economic situation arises.[22] What may be the prospects of such a change we can leave to the prophets and the economists,[23] but it is interesting to note that the Ridley Committee in 1945 thought with what must now appear to be rather remarkable optimism that control might not be necessary for more than another ten years.[24] In fact, as we shall see shortly, many more controls have since been introduced and others are contemplated, all however framed on the same assumption that they are temporary expedients to expire or be repealed at the end of the emergency. One may perhaps recall the saying in a recent autobiography that in Tsarist Russia no laws were more permanent than temporary legislation.[25] The Rent Acts have now been 'temporarily' in force since 1915 and afford at any rate testimony to the uniformity of legal notions in widely differing jurisdictions. One unhappy consequence of this 'temporary' outlook has been that it has enabled successive governments to fight shy of the formidable task of revising and consolidating the Rent Acts. The result has been that statute has followed statute dealing with new points in an entirely improvised way and with no attempt to reduce this miscellany of Acts to a coherent shape. The appalling confusion and complexity which has resulted is too well known to require detailed illustration. Of the manner of drafting of this legislation it will suffice to say that it has been characterised by Mackinnon, L.J., as savouring rather of the style of popular journalism than of the language usually employed by conveyancers.[26] Thus, not only has the Act of 1939 resulted in a distinction between two kinds of control usually known as old and new control, but before it can be ascertained which of these applies it may be necessary to apply no less than eleven distinct tests, many of which involve questions of great complexity.[27] And this type of inquiry has usually to be conducted in relation to the poorer class of litigant, often unrepresented, by an unfortunate county court registrar. It is, however, deserving of emphasis that much of the criticism directed to the drafting of the Acts is applicable to the rent provisions rather than those dealing with possession. Even here, however, the protection of sub-tenants and persons other than the tenant himself is either formulated in perplexingly obscure language or is ignored altogether, and the courts have been left to make of it what they can.[28]

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[15] 1933 Act, s. 3 (1).

[16] Apart from a person who claims by title paramount; see *e.g. Dudley Building Society* v. *Emerson* [1949] 2 All E.R. 252.

[17] *Keeves* v. *Dean* [1924] 1 K.B. 685; *Lovibond Ltd.* v. *Vincent* [1929] 1 K.B. 687. But cf. 1920 Act, s. 12 (1) (g).

[18] *Skinner* v. *Geary* [1931] 2 K.B. 546; *Brown* v. *Brash* [1948] 2 K.B. 247.

[19] *Roe* v. *Russell* [1928] 2 K.B. 117; cf. 1933 Act, 1st Sched., para. (d). A sub-letting of the whole of the premises without the consent of the landlord is a ground of claiming possession even if there is no breach of covenant (*ibid.*).

[20] 1933 Act. s. 4 (1).

[21] Seagle, *Quest for Law,* p. 266. Cf. Bernard Shaw in the Postscript to *Back to Methuselah*: 'In the nineteenth century we reacted from an effete feudalism into a Cobden-Croce world in which the love of money is the root of all good, and freedom of contract and thought man's choicest treasure'.

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[22] See 1939 Act, s. 1.

[23] Cf. *RCP*, pp. 135–136.

[24] Cmd. 6621, p. 9.

[25] Weizmann, *Trial and Error*, p. 29.

[26] *Salter* v. *Lask* [1925] 1 K.B. at p. 588. But cf. Denning, L.J.'s words of sympathy for the draftsman in *Seaford Court Estates, Ltd.* v. *Asher* [1949] 2 All E.R. at p. 164.

[27] See Lloyd and Montgomerie, *Rent Control* (1949), pp. 38–40.

Whatever the long-term prospects may be, the bands of control continue to be drawn tighter and tighter. A few words must be said here of the most recent developments, as they are of great social and practical importance. I will deal with these under the headings of furnished premises, extensions of the Rent Acts, and business premises.[29]

(1) *Furnished premises.* The most radical innovation has been in the case of contracts which grant possession of premises in consideration of a rent which includes payment for furniture or services. The Rent Acts, with certain limited exceptions, have never extended to furnished lettings or cases where board or attendance are provided.[30] It was always recognised that such lettings were in their nature of a temporary kind and that it would be unfair to deprive the landlord of the right to recover his furniture. Moreover a house might be let furnished at the seaside for the summer season, and it would be absurd if the tenant in such a case could be able to claim a statutory tenancy when the short term granted to him expired. On the other hand to provide a rent-fixing machinery without some security of tenure would encourage acquiescence in illegal exactions for the sake of having the accommodation. In 1946, as a result of the recommendations of the Ridley Committee, the Furnished Houses (Rent Control) Act was passed, which introduced a compromise of a very far-reaching kind. Not only did the scheme of this Act involve a further step away from freedom of contract but it also provided another example—on a very big scale—of the tendency to create special tribunals to deal with certain problems to the exclusion of the ordinary courts of

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[28] See 1920 Act. ss. 5 (5), 15 (3); *Oak Property Co., Ltd.* v. *Chapman* [1947] K.B. 886.

[29] See also Building Materials and Housing Act, 1945, s. 7 (extended by Housing Act, 1949, s. 43 until December 1953), as to houses built or converted under building licences; Housing Act, 1949, s. 22, as to houses in respect of which a local authority has made an 'improvement grant'.

[30] 1920 Act, ss. 9, 12 (2) proviso (i); 1939 Act, s. 3 (2) (b).

law. It is true, as *The Times* has pointed out, that the issue before those tribunals is more in the nature of price-fixing than of the administration of justice,[31] and further express provision was made to prevent the new tribunals from encroaching upon the sphere of the Rent Acts.[32] It will be seen in a moment how far the later Act of 1949 has involved a retreat from this position.

The task of the new tribunals is to fix reasonable rents of furnished lettings, or lettings which include services, and the rents so fixed are then entered upon a register kept by the local authority.[33] Thereafter no higher amount than the registered rent can be charged. Save in two special cases, a tribunal can approve an existing rent or reduce it but cannot increase it.[34] This point is worth noting and I will return to it. A limited security of tenure is conceded where a notice to quit is served upon a tenant after he has referred the amount of the rent to a tribunal. In this case the notice will not take effect less than three months from the decision of the tribunal unless the tribunal directs that a shorter period is to be substituted.[35] A few recent statistics may do something to indicate the range of these activities. Some eighty tribunals are now operating, to which by November, 1949, more than 45,000 cases had been referred, and the rent has been reduced by an average of 30 per cent in 68 per cent of the decided cases.[36] The personnel of each tribunal consists of a chairman and two members who are appointed by the Minister and are not required to have legal or any other specific qualifications.[37] Remuneration is not by salary, but on the basis of so much a sitting. The tribunal is not bound by the rules of legal procedure or evidence[38] and there is no appeal of any kind.[39] However, if there is an excess of jurisdiction the decision may be quashed on *certiorari*[40] and in conducting its proceedings there is the usual obligation to observe what have been called the rules of 'natural justice'.[41]

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[31] *The Times* newspaper, January 4, 1949.

[32] 1946 Act, s. 7 (save that sections 9 and 10 of the 1920 Act are not to apply in the case of a registered rent, nothing in the Act is to affect any provisions of the Rent Acts). Cf. *R.* v. *Paddington R.T.* [1948] 2 K.B. 413.

[33] 1946 Act, ss. 2, 3.

[34] Section 2(2), (3) and (4). The two cases are (1) where a registered rent is submitted to a tribunal for reconsideration on the ground of change of circumstances, and (2) where there has been an increase in the cost of providing services since September 3, 1939 (see section 2 (3) and (4)).

[35] Section 5.

[36] See *Law Times Journal* (1949), Vol. 208, p. 320.

[37] 1946 Act, Schedule. The decision of the majority prevails.

[38] F.H. (Rent Control) Regs. 1946, para. 8.

[39] *R.* v. *Paddington Rent Tribunal, ex parte Kendal Hotels, Ltd.* [1947] 1 All E.R. 448.

(2) *Extensions of the Rent Acts.* I now come to deal briefly with the Act which has recently been passed under the title of the Landlord and Tenant Act, 1949, and in the course of that examination I hope it will emerge how the dividing line between the administration of the Rent Acts and the functions of Furnished Rent Tribunals has been broken down. Before adverting to this I must emphasise that Rent Act cases have from the beginning fallen to be dealt with by the county courts and indeed represent now, more than ever, a substantial proportion of the work of those courts. I do not think it can be gainsaid that the county court judges as a whole—all of whom are naturally trained and experienced lawyers of considerable seniority—have been eminently successful both in making their way through the welter of legal confusion and also in bringing a balanced and judicial mind to bear in solving issues of fact which would often baffle a resurrected Solomon. Indeed it has sometimes occurred to me that decisions of county court judges providing for the equitable sharing of a dwelling-house are strongly reminiscent of that monarch's most famous reported case. Of course one of the most compelling reasons why cases under the 1946 Act could not be referred to county courts was quite simply that these courts would—as the statistics I have cited amply testify—have been overwhelmed by them. And so we have the Rent Tribunals, bodies which on the whole appear to have performed their function efficiently and to the satisfaction of tenants if not of landlords. What new tasks then have devolved upon them under the 1949 Act?

In general terms these tasks relate to (a) fixing the rents of certain premises *already within the Rent Acts,* (b) certain powers in relation to premiums, and (c) the fixing of rents in the case of premises where there is shared accommodation.

(a) An unfurnished letting since 1939 of premises never previously let may be within the Rent Acts and the first letting will thus fix the standard rent.[42] But this rent may be an excessive

[40] *R.* v. *Paddington R.T., ex parte Bedrock Investments, Ltd.* [1947] K.B. 984.

[41] *R.* v. *Kingston-upon-Hull R.T., ex parte Black* [1949] 1 All E.R. 260.

[42] 1939 Act, 1st Schedule. The material date is September 1, 1939.

one which the landlord was able to exact owing to the abnormal war-time conditions. Consequently Rent Tribunals are given power to reduce any such standard rent to an amount that it considers reasonable, but in doing so difficult questions arising out of the Rent Acts may have to be incidentally decided, *e.g.*, whether there is a dwelling-house within the meaning of the Acts, or whether the rent is ascertainable by apportionment.[43] No guidance is given as to what constitutes a reasonable rent.[44] For example, if a house was converted into separate self-contained flats in 1945 so that the rents then charged became the standard rents, a Rent Tribunal may reduce those rents to an amount which inflicts a ruinous loss upon the landlord but the decision will be without appeal. Moreover, since controlled rents generally have been pegged at pre-1939 or even earlier values while all other costs have risen, if tribunals allow themselves to be guided by such rents in determining what is *now* a reasonable rent they will, to quote *The Times* again, 'be trying to arrive at the reasonable by standards derived from the unreasonable'.[45] But there is nothing to stop a tribunal assessing the rent on this basis if it so desires. A few statistics may also be of interest here. The 1949 Act came into effect on June 2, 1949, and by November 3,500 applications thereunder had already been made. In 86 per cent of the cases actually decided by that date the rent has been reduced, the average reduction being 20 per cent.[46]

(b) Premiums and key-money were generally illegal under the Rent Acts but in some cases were lawful.[47] The new Act has now rendered all such provisions illegal[48] and has also provided a most elaborate procedure to enable a tenant, if he applies to a Tribunal within one year of the passing of the Act, to recoup himself in respect of a premium which he has already paid possibly years before the Act was thought of and which may have been perfectly lawful at the time. The machinery by which this is to be achieved[49] is too complex for brief treatment and I cannot do more here than draw your attention to the retrospective effect of these provisions. The requiring of a premium by a contractual tenant on the assignment of his tenancy has also been prohibited.[50]

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[43] 1949 Act, s. 1.

[44] '"Fair rent" is a fine slogan, but an elusive term to define' (*RCP*, p. 136).

[45] *The Times* newspaper, January 4, 1949.

[46] *Law Times Journal* (1949), Vol. 208, p. 320.

[47] *I.e.* where a term of not less than fourteen years was granted; see 1920 Act, s. 8 (3).

[48] 1949 Act, s. 2 (1) (7).

[49] See 1949 Act, 1st Schedule, Part 1.

(c) A curious loophole in the Rent Acts was revealed by the Court of Appeal in 1945. Those Acts only apply to a house 'let as a separate dwelling'.[51] Suppose a house is let in separate parts to two tenants, each tenant having the exclusive possession of certain rooms but other accommodation being shared in common. It was decided in *Neale* v. *Del Soto* that if the shared portion consisted of essential living accommodation then no part of the letting amounts to a separate dwelling and therefore the Acts were excluded.[52] For this purpose a kitchen was looked upon as living accommodation[53] but not a bathroom or W.C.[54] As a result a large number of kitchen-sharing tenants found themselves unexpectedly without protection and *Neale* v. *Del Soto* became a sort of landlord's charter. The new Act has here stepped in and nicely apportioned the matter between the Rent Acts and the Tribunals. If the sharing is merely between tenants the Rent Acts are still to apply[55]: if, however, one of the sharers is the landlord himself, the premises although unfurnished will come within the 1946 Act, so that the Tribunals can determine what is a reasonable rent and there will be the limited security of tenure given by that Act as increased by the 1949 Act.[56] The letting will not, however, be within the protection of the Rent Acts. The 1949 Act has now given

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[50] 1949 Act, s. 2 (2). Such premiums had hitherto been held to be lawful; see *Remmington* v. *Larchin* [1921] 3 K.B. 404. There is a curious anomaly under the 1949 Act whereby a person who has been granted a lease before the Act at what was then a lawful premium can pass on some portion of that premium to his assignee, whereas an assignee of a lease who has similarly paid a lawful premium on the assignment is debarred from passing on any portion of that premium to his assignee; see 1949 Act, 1st Schedule, Part 2.

[51] 1933 Act, s. 16 (1).

[52] *Neale* v. *Del Soto* [1945] K.B. 144. The sharing might also be with the landlord himself: *Sharpe* v. *Nicholls* [1945] K.B. 382; or even between the tenant and his sub-tenant: *Turner* v. *Baker* [1949] 1 K.B. 605; but as to this latter case see now 1949 Act, s. 9.

[53] *Neale* v. *Del Soto, supra.*

[54] *Cole* v. *Harris* [1945] K.B. 474.

[55] 1949 Act, s. 8. Although the full control of the Rent Acts only applies to the part occupied exclusively by the tenant, a control subject to certain special rules is also thrown round the shared portion; see s. 8 (6), (7), (8).

[56] 1949 Act, s. 7.

Rent Tribunals power to award successive extensions of three months' security of tenure in addition to the original three months provided for in the 1946 Act,[57] but it is by no means clear on what basis this extended power is to be exercised. For if such extensions are to be granted almost automatically the status of a furnished letting is likely to become comparable to that of a protected tenancy within the Rent Acts. Moreover, the granting of extended security of tenure must necessarily involve that judicial weighing of conflicting interests and relative hardships of the parties for which a Rent Tribunal cannot be as well equipped as a regular court of law. This apparently slight amendment of the 1946 Act does therefore appear to involve a very marked encroachment upon the normal sphere of operation of our ordinary courts of justice.

(3) *Business Premises.* It will have been seen by now that the net has been cast so wide that for practical purposes there remain only two classes of lettings effectively beyond control of some kind. Firstly there is a house whose rateable value exceeds £100 in London or £75 outside London and is therefore not within the protection of the Rent Acts.[58] As such a class of house represents only a tiny percentage of existing dwellings and the rich—if that term has any significance in these days of Crippsian austerity—are the one section of the community which is expected to fend for itself, no developments in the way of upgrading the financial limits of the Rent Acts is very likely at present. It should be noted, however, that in the case of furnished lettings there are no financial limits to the operation of the Furnished Houses Act of 1946.

The second class is that of business premises.[59] For a very short period after the 1914 war such premises were included in the Rent Acts, but this ceased in 1921.[60] Since then only one type of business accommodation has been within those Acts, *viz.*, where a house consists partly of a dwelling and partly of business premises and both parts are in the occupation of the same tenant under a single letting.[61] A typical instance is a shop with a residential upper-part. All other business premises remain uncontrolled both as regards rent and security of tenure apart from the very limited security granted by the Landlord and Tenant Act of 1927. It is therefore not surprising that attention should be directed to this stray rabbit that has escaped out of the bag.

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[57] Section 11.

[58] 1939 Act, s. 3.

[59] Agricultural tenancies are also not within the Rent Acts but are subject to a special control under the Agricultural Holdings Act, 1948.

[60] 1920 Act, s. 13.

[61] 1920 Act, s. 12 (2) (ii); 1939 Act, s. 3 (3). Provided of course the whole premises are within the financial limits of the Acts.

The Act of 1927 was a very tentative and, it must be admitted, a rather unsuccessful effort to afford some protection to a business tenant. That Act, however, is not concerned with security of tenure as such but with the loss of goodwill.[62] It is based on the theory that if a tenant has carried on business for a certain period on premises goodwill may adhere to those premises. If then the tenant at the end of the lease is obliged to go he leaves his goodwill behind, and this may enable the landlord to get a higher rent for the premises. In other words the landlord will profit from his tenant's exertions and the tenant will get nothing in return. The Act therefore provided that in certain circumstances a tenant could claim compensation for loss of goodwill or even, if he could show that monetary compensation would be inadequate, the compulsory grant to him of a new lease not exceeding a term of fourteen years, the rent to be fixed, in the absence of agreement, by the County Court.[63] Not only, however, were these rights hedged round with many technical obstacles but the Act also set up a number of detailed circumstances in which the landlord could successfully resist his tenant's claim.[64] For these and other reasons the 1927 Act has not proved of very great value in preserving the interests of business tenants.

In June, 1948, a Leasehold Committee was appointed to investigate various problems relating to tenancies and in June, 1949, an Interim Report was published setting forth its recommendations as to business premises.[65] The Report, after a very interesting résumé of the position in other countries, goes on to state that the evidence showed that there was a sellers' market in business premises but that business tenants were more concerned with the problem of insecurity than with the level of rents. The Committee has therefore recommended as follows:—

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[62] See Landlord and Tenant Act, 1927, s. 4.

[63] *Ibid.*, s. 5.

[64] See 1927 Act, s. 4 (1) proviso (a) (c) (f); s. 5 (3). Cf. *Whiteman Smith Motor Co.* v. *Chaplin* [1934] 2 K.B. 35; *Charrington* v. *Simpson* [1935] A.C. 325.

[65] Cmd. 7706.

(1) That there should be no general scheme of rent control for business premises.

(2) That a business tenant at the end of his tenancy should, subject to just exceptions, be automatically entitled to a renewal of his tenancy for not more than seven years, but should be free to apply for subsequent renewals.

(3) This right should not depend on any proof of goodwill, and should extend to all types of business activities, unlike the 1927 Act, which, in this respect, did not cover professional practices.[66]

(4) There should be no contracting-out of the scheme.

(5) The Tribunal to deal with problems under the scheme should be the County Court while avoiding the atmosphere of litigation associated with its normal procedure.[67]

(6) After the manner of former legislation the Committee stress that the scheme is only temporary to meet the period of the sellers' market and they add the oracular observation that how long the scheme should remain in force must depend on the duration of the conditions which have brought it into being. This conundrum they sagely leave to the wisdom of Parliament to resolve.

Before I conclude this survey I should also point out that the Leasehold Committee has still to report on the questions whether a tenant should have the right of compulsory purchase of the freehold—that such a matter should even be thought deserving of consideration indicates how far we have travelled since the pre-1914 era—whether the rights of a landlord to impose covenants of repair should be restricted and whether further provision—the Act of 1927 again made limited provision for this in the case of business and professional tenants[68]—should be made for tenants to be compensated for improvements.

Finally, we may legitimately inquire whether these profound changes accomplished in a particular branch of law within the space of a generation throw any light on the general trend of legal development in this country. It is readily understandable, with such far-reaching developments going on before our eyes, to what extent notions of the nature of law will vary from age to age. Each period inevitably visualises the legal process in its local setting and tends to emphasise the paramount trends of its time. In this way differing views have arisen: to one era law may appear as a reflection of divine reason governing the universe, to others as a philosophically discovered body of principles, or the means whereby the realisation of the freedom of the human will is achieved, while a more cynical approach may treat it as no more than the arbitrary command of sovereign power. All these views and many others have at times been tenaciously upheld and at others emphatically discarded. An important school of thought at the present day urges that we must regard law as a process of social engineering, and Dean Pound, its foremost exponent, tells us that law in essence involves such an 'adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste'.[69] Perhaps this too represents no more than a facet of the whole truth. Apart from the obvious difficulty of regarding the law as a means of achieving economic efficiency and fair shares rather than as the upholder of existing rights or claims, it will also be apparent that this approach lays stress on the ideal of law as expounded by courts striving to be the impartial upholders of justice between man and man. Of course no modern school of thought is more conscious than this particular one of the ideological influences which may sway the minds of judges, but there is yet another factor which may be even more important and must not be overlooked, *viz.*, the ideology which sways the legislature as the creator of new law. Whatever may be the attitude of courts of law, the legislative body—with its overriding interventions into every field of legal affairs—inevitably introduces a haphazard element according to the notions which animate that section whose will happens to be temporarily in the ascendant. This factor is especially noticeable in the recent

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[66] 1927 Act, s. 17.

[67] This end is to be achieved by the judge (or a surveyor, or the judge with a surveyor as assessor) sitting as an arbitrator.

[68] 1927 Act, ss. 1 and 17.

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[69] R. Pound, *Social Control through Law*, p. 65.

'bias'—if I may use that rather tendentious word—in favour of tenants. I need only pause to direct your attention to such matters as the refusal to consider amending the Rent Acts on the ground that 'there would be bitter and fierce resentment throughout the whole country if the Government exposed millions of houses to a review of their rents'[70]; the powers conferred on Rent Tribunals to reduce rents but not to increase them; the reluctance to declare unlawful the demanding of a premium on the assignment of a contractual tenancy while stopping up every gap which might enable a landlord to obtain a premium[71]; the pegging of rents at 1939 values notwithstanding that all other prices have substantially risen, including the cost of repairs, so that premises are allowed to fall into disrepair because it ceases to be an economic proposition to maintain them.[72] At the same time local authorities retain the right to increase their rents,[73] while even such an impartial landlord as a housing association[74] is without the power to do likewise. This is not, as you might think, part of a plea on behalf of oppressed landlords; I have already attempted to show that times were when a very different balance of power prevailed. It may be said that these legislative policies are no more than a distortion of the true nature of law as an impartial arbiter, but all I desire to stress is that a complete picture of the nature of the legal process must take account of such features and cannot argue them away by dubbing them 'distortions' or a 'warping' of the jurists' ideal picture of the law in action.[75] Nor, I would suggest, does the operation of the governing ideology of the legislator enable us to subscribe to the Marxian idea that law is no more than the will of the dominant class in a particular society.[76] A moment's reflection upon the course of development of the law of landlord and tenant during the last thirty years in this country will show how unreal is such a simplification as this. Firstly, this view assumes that there is one continuous dominant class in power whose laws are ruthlessly directed towards the advancement of its own interests. It pays no regard to the developments which may take place within a democratic state and which may permit a reversal of ideology from Parliament to Parliament or from Congress to Congress. Moreover, if we extend our gaze over the political scene in England since 1918 we see many governments of diverse shades of colour, but the tendency to treat the tenant—rightly or wrongly—as the spoilt darling of the law goes steadily on.[77] Who will say what movements to and fro may not occur in the measurable future? In all this there is little sign of an inexorable pressure by one dominant section of the community to attain its own self-seeking and oppressive ends. However incomplete may be the picture of law as a balancing of interests, it seems to fit the working of a democratic state such as England or America far more realistically than the notion of a naked class-struggle.

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[70] *Per* Mr. Aneurin Bevan, Minister of Health, in the House of Commons, moving the second reading of the Bill which became the 1949 Act (see *The Times,* January 25, 1949). It is with some justice that the problem of rent control is declared to be 'one of the most complex of the day, full of political and emotional content' (*RCP,* p. 126).

[71] The original Bill contained no provision for this and was only amended to include it after considerable pressure. As *The Times* commented (February 7, 1949), Mr. Bevan seemed strangely unwilling to admit that landlords are not the only people who may be tempted to turn the housing shortage to their advantage.

[72] It is well known that in France this situation is resulting in the rapid decay of leasehold premises. It is suggested in *RCP* that rents should be allowed to rise by as much as 75 per cent to meet this need, but that such an increase is not 'politically practicable' (p. 129). An increase ranging from 25 to 75 per cent is recommended, with the admission that it will be 'politically unpopular and administratively difficult' (p. 143).

[73] See 1939 Act, s. 3 (2); Housing Act, 1936, s. 83 (1); *Belcher* v. *Reading Corpn.* [1949] 2 All E.R. 969.

[74] Thus, one such association which lets agricultural cottages at 2s. or 3s. a week finds its present costs of repairs more than the total rent received (*RCP,* p. 132).

Lastly, I would point out that we see in recent developments in this branch of law a conspicuous instance of the changed position of the courts in the modern state. In the first place, yet another range of important judicial or semi-judicial activities has been entrusted to a newly-created set of tribunals to the exclusion of the ordinary courts of law, and without any right of appeal thereto. Lord Justice Denning[78] has recently added the weight of his authority to the long-standing criticism that appeals from all tribunals exercising judicial functions[79] should lie to the High Court[80] on a point of law. Yet it may perhaps be asked in the case of Rent Tribunals whether such a right of appeal would go far enough. For in the greater majority of cases it will be impossible to point to any disregard of a rule of law, and the party's real grievance will be that the decision is unreasonable *on the facts.* Even now the courts do sometimes contrive to quash a decision for what is in effect an error of law on the ostensible ground of excess of jurisdiction.[81] And if where a tribunal has the statutory function of determining what is a reasonable rent, the test of reasonableness or the factors to be taken into account in arriving at a decision are to be regarded as legal issues,[82] the nature of the inquiry will differ but little from an appeal as to the facts themselves. Whether the appeals are to be allowed on the facts generally or at least on the law in the extended sense suggested, it is clear that the appellate court will require something comparable to the judge's note in a county court showing what evidence was proferred, what facts were accepted or rejected by the tribunal and the reasons for the decision.[83] This would necessitate a careful record of every hearing and disputes as to what did or did not occur might sometimes entail the necessity of ordering a rehearing. Further, if parties are to be represented on appeals, orders as to costs seem unavoidable (at present the Rent Tribunal itself has no power to make any order as to costs). Appeals might also be very numerous and the prospect of the expense might well deter a tenant from applying to a tribunal at all. In a word we are faced here with the fundamental dilemma that the full safeguards of legal justice are cumbrous and costly and difficult to reconcile with a system of inquiry intended to provide a summary and inexpensive disposal of the issue between the parties. And this dilemma will remain until our legal system can evolve some simpler and more expeditious mode of appealing to a regular court of law, though the Legal Aid Act, if it is ever extended to cover such matters, may provide at any rate a partial solution.[84]

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[75] Cf. Pound, *Introduction to the Philosophy of Law,* pp. 94, 95.

[76] See Vyshinsky, *Law of the Soviet State* (U.S. translation, 1948), pp. 10–15, 30–31, 38.

[77] Thus during the 1930s 'it is generally accepted that there was no great scarcity of houses' (*RCP*, p. 135), but despite some decontrol, a large measure of control was still retained.

[78] *Freedom Under The Law,* pp. 76, 118–122.

[79] Among which Denning, L.J., includes Rent Tribunals (see pp. 92–94).

[80] Or to some other permanent independent appeal tribunal, *e.g.* a Commissioner as under the National Insurance Acts.

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[81] Cf. *R.* v. *Hampstead R.T.* [1947] K.B. 973; *R.* v. *Croydon R.T.* [1948] 1 K.B. 60.

[82] These latter are regarded as matters of law by Denning, L.J. (see p. 93). Cf. the cases under the Rent Acts on when it is 'reasonable' to make a possession order (*e.g. Warren* v. *Austen* [1947] 2 All E.R. 185; *Briddon* v. *George* [1946] 1 All E.R. 609) or, what constitutes 'greater hardship' (*e.g. Coplans* v. *King* [1947] 2 All E.R. 393). Denning, L.J. (*op. cit.,* at p. 96) also adds that appeals should be allowed not only on points of law but also, in proper cases, on questions of facts. Proper cases would include those where the tribunal has power to decide by a majority (p. 88). Cf. also (1949) 65 *Law Quarterly Review,* p. 441.

[83] Denning, L.J., regards this as a desideratum in all cases (*op. cit.,* p. 91).

Secondly, not only has a complete discretion been granted on certain issues to quasi-judicial tribunals but also on those matters still within the ambit of the courts a wide discretion is conferred by such provisions as require a county court judge, before making a possession order under the Rent Acts, to be satisfied that it is reasonable to make the order. It would appear that there is scope here for a fruitful study of the operation of these two systems working side by side which might afford useful data for reaching an unprejudiced judgment as to the respective value of the two methods of approach. I have little doubt that for good or ill non-judicial tribunals have come to stay, but it does seem to me that in this country at least there is room for a far more extensive study of their actual workings[85] before it will be possible to appraise their real function and the limits of their utility. From such a study may emerge not only extensions of the power of judicial review but even some recasting of the regular judicial process, perhaps rendering the ordinary courts more popular to litigants and less vulnerable to the encroachments of non-judicial bodies.

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[84] At present it does not extend to decisions of tribunals which are not courts of law.

[85] A start has been made since this lecture was delivered by the publication of *Administrative Tribunals at Work,* under the editorship of R. S. W. Pollard.

6

THE EVOLUTION OF THE LAW OF LIBEL

Richard O'Sullivan

The evolution of the English law of libel starts from an Anglo-Saxon origin and traces its course through the Norman-French technique of the early common law to the mature English language of our day. Its history reflects the fashions of speech and writing, and the social and political ideas of all these ages: and the changing relations of Church and State, of Crown and subject, of State and citizen, the rise and fall of the Star Chamber, and the Court of High Commission, the emergence of a free press and free criticism, the adjustment of the relation between judges and juries, between judiciary and legislature, the growth of absolute and defeasible immunity, the attempt, not altogether unsuccessful, on the part of the press to secure for itself a position of some privilege and of statutory advantage.

In the Anglo-Saxon time the laws of Alfred and of Edgar and Cnut alike provided that one who spoke words of insult to another should have his tongue cut out, unless he redeemed it with the price of his head.

In the *Lex Salica* it is decreed that one who calls a man 'wolf' or 'hare' must pay him three shillings; while one who calls a woman a 'harlot', and is unable to prove the truth of the charge, must pay her forty-five shillings.

In the Norman Custumal it is written that the man who has falsely called another 'thief' or 'manslayer' shall pay damages and, holding his nose with his fingers, confess himself a liar. In the course of time, local Courts provided a remedy not only for insult spoken directly to a man's face, but also awarded damages for defamation spoken behind his back to a third party. Indeed, of the torts of which the village folk are found to have accused one another, the records of the manorial courts show that defamation is one of the most common. Here is the record of a case in the Court Baron: 'It is found by inquest that Rohase

Bindebere called Ralph Bolay "thief" and he called her "whore". Therefore both in mercy, three pence. And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohase, as has been found, therefore it is considered that the said Ralph do recover from the said Rohase twelve pence for his taxed damages'.

Professor Plucknett calls attention to the case, in 1320, of one Alice Batte, who defamed the lord's corn 'whereby purchasers forbore to buy it'.[1] The Durham Halmote contains an entry: *'Injunctum est omnibus mulieribus villae quod compescant linguas suas et quod non litigent nec maledicant'.*

Apart from the local courts, the Church Courts or Courts Christian exercised what was at one time an almost exclusive jurisdiction in matters of defamation. Throughout the Middle Ages, honour and good name were reckoned a kind of spiritual possession:

'Good name in man and woman, dear my lord,
Is the immediate jewel of their souls'.

It was perhaps natural in the circumstances that the protection of honour and good repute should be entrusted to the spiritual courts. Their jurisdiction in this respect was recognised by the legislature and the King's judges. In the *Friar's Tale* Chaucer says:—

'Whilom there was dwellyng in my countré
An erchedeken, a man of gret degré,
That boldely did execucioun,
In punyschyng of fornicacioun,
Of wicchecraft, and eek of bauderye,
Of *diffamacioun,* and avoutrie,
Of chirche-reves, and of testamentes,
Of contractes, and of lak of sacramentes,
And eek of many another maner crime,
Which needith not to reherse at this tyme;'
(See H. 1, 619).

In 1285 the writ called *Circumspecte Agatis* confirmed the principle that the punishment of defamation as a sin where money is not demanded was not subject to prohibition by the King's Court. The practice of the Church was at once to silence the tongue of the defamer in the interests of public morals

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[1] Plucknett, *A Concise History of the Common Law* (4th ed.), p. 455.

(*pro custodia morum*), and for the good of the soul (*pro salute animae*) of the offender. The usual penance was an acknowledgment of the baselessness of the imputation, in the vestry room in the presence of the priest and churchwardens of the parish, and an apology to the person whose reputation had been injured.[2]

In the course of time a certain spirit of rivalry or of competition grew up between the Courts Christian and the King's Courts. In the reign of Edward IV the Common Law Court gives a hint that a writ of prohibition might issue if the Court Christian entertained a suit for defamation imputing a crime which would be cognisable in the common law courts. In the Year Book of 27 Henry VIII, the principle is formulated in an action on the case for calling a man a 'heretic and one of the new learning'. *'Il est cler que cest action ne gist icy; car il est merement spirituel. Et si le defendant justifieroit que le pleintif est Heretique . . . nous ne pouvons discusser s'il soit heresie ou non; mes s'il fuit un chose ou pouvons determiner le principal, come Thief ou Traitor ou tiels, pro eux un action gist icy. . . . Ascuns choses sont mixez et punissable en ambideux Leys . . . et pro ceux on peut eslire ou il veut porter son cas . . .'*.

In the post-Reformation period the Courts of Common Law, finding that the civilian judges and advocates of the new ecclesiastical courts of our Lord the King were less tough than the Roman Canonists of the old Courts Christian, began gradually and then shamelessly to poach; and finally ended by usurping almost the whole jurisdiction of the Ecclesiastical Courts in matters of defamation. On the principle that the *accessorium* must follow the *principale*, the Courts of Common Law assumed jurisdiction over actions of defamation in which there was an imputation of crime or of plague or leprosy (for these things had consequences in the civil law), or of unfitness for office in the administration of justice or otherwise, or in which a claim for special damage was made. And the principle was laid down by Coke as an established maxim in the law that 'where the common or Statute law giveth remedy in *foro seculari* (whether the matter be temporal or spiritual) the conusance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the spiritual courts be saved, or allowed by the same Statute, to proceed according to the ecclesiastical laws'.

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[2] It is not altogether unlike the modern practice of making in open Court a statement agreed before the Judge in Chambers.

Early in the seventeenth century the outlines of the modern law are clear. In the 1647 edition of March's book on slander a cause of action is given at common law to 'all scandalous words which touch or concern a man in his life liberty or member, or any corporal punishment; or which scandal a man in his office or place of trust; or in his calling or function by which he gains his living; or which tend to the slandering of his title or his disinheritance; or to the loss of his advancement or preferment, or any other particular damage; or lastly which charge a man to have any dangerous infectious disease by reason of which he ought to separate himself, or to be separated by the law, from the society of men'. An imputation against the chastity of a woman was still a matter 'merement spiritual' and was actionable only in the spiritual court.

The new jurisdiction of the common law courts in actions on the case for words was immensely popular. Men were more stimulated by the prospect of enriching themselves with an award of damages than they had been by the hope of ensuring the salvation of their neighbour by the improvement of his spiritual estate. The official policy of the Crown and of the Star Chamber which aimed at the discouragement of duelling helped also to drive men to litigation. Under Elizabeth and James I and Charles I the reports teem with actions on the case for words, of which there had been no more than ten in all the Year Books down to 1535. Rolle's abridgement (temp. Eliz.) reports no less than 350 cases of slander. In Croke Jacobus there are 121; in Croke Carolus there are 81; in Style (temp. Commonwealth) 120.

The popularity of the common law action on the case for words obliged the judges soon to take steps to diminish the flow of litigation. In *Stanhope and Blith's Case*[3] Wray, C.J., said that 'the judges had resolved that actions for scandals should not be maintained by any strained construction or argument nor favour given to support them forasmuch as in these days they more abound than in times past'. In *Crofts* v. *Brown*[4] Coke expressed the prevailing mood: 'We will not give more favour unto actions upon the case for words than of necessity we ought to, *where words are not apparently scandalous,* these actions being now too frequent'. In 1624 Parliament took a hand by enacting[5] that if the jury in an action of slander award less than 40/- by way of damages the plaintiff shall have no more than 40/- costs.

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[3] (1585) 4 Co.Rep. 15a.

[4] (1617) 3 Buls. 167. The italics are mine.

In order to reduce the number of these actions the courts developed the habit of interpreting alleged defamatory words *in mitiori sensu.* 'Lou les paroles sont dubious et poient receiver un double interpretation lun voie que ils seront actionable et l'autre nenny, ils seront prise *en mitiori sensu'*.[6] In this mood the judges examined the words in the manner in which they were accustomed to examine a writ or a pleading in order to discover, if possible, a non-defamatory sense; and they succeeded beyond all expectation. In Rolle's Abridgement we read: 'If a man says of A "he was a pickpocket and had picked my pocket and took twelve shillings of money out of my pocket", no action lies for these words, because it might be done merely as a trespass or in jest, and not feloniously'. Nor may we overlook the memorable decision in *Holt* v. *Astrigg.*[7] In this case the defendant had spoken these words: 'Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head, the one part lying on the one shoulder, and the other part on the other'. In an action brought by Sir Thomas Holt for defamation imputing murder, it was submitted for the defendant on the principle of *mitiori sensu,* that no crime was imputed by the words but only an actionable trespass. The submission prevailed. Judgment for the plaintiff was arrested 'for it was not averred that the cook was killed, but *argumentative*'; and 'slander ought to be direct, against which there may not be any intendment, but here, notwithstanding such wounding, the party may yet be living, and it is then but trespass'.[8]

The doctrine of *mitior sensus* was invoked also at the trials of the regicides of Charles I by John Cook, who had acted as Solicitor General at the trial of the King, and had prayed

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[5] 21 Jac. 1, c. 16.

[6] Rolle, Ab. 1, 71, z. pl. 1.

[7] (1607) Cro. Jac. 184.

[8] For which wrongful act the cook, on recovering from his shoulders and reuniting the divided moieties of his cleft skull, might sue his master.

'immediate judgment on the prisoner at the bar'. At his own trial Cook excused himself on the ground that he had no participation in the King's death, not being a member of the court which pronounced judgment, and having merely for a fee discharged the duties of counsel. And as for having demanded 'immediate judgment' on the royal prisoner, he asked that the words be taken *in mitiori sensu,* and that it should be presumed that he meant a judgment of acquittal.

In the course of time the fashion of interpreting words *in mitiori sensu* ceased, and the modern rule prevailed that all words stand upon their own feet and that they are to be taken in the natural and obvious sense in which they will be understood by those to whom they are spoken.

The slow substitution of the common law action on the case for words for the ancient remedies in the spiritual courts proceeded on the assumption that the wrong in each case was done by one private citizen to another, and that the damage it caused was in the last resort measurable in money. Damage was accordingly the gist of the action; damage, not insult. One can understand without entirely accepting the dictum of Sir Frederick Pollock that 'the law went wrong from the beginning in making the damage and not the insult the cause of the action'.[9]

As damage was thus conceived to be the gist of the action, it followed that no action lay unless the defamatory words or matter had been published to a third person; and also that truth was a defence for (so it was argued) a person ought not to be compensated for injury to a character that he did not or (in another meaning of the word 'character') that he ought not to possess. It followed too that, an action on the case for words being an action for reparation of a wrong done to the moral personality of the person defamed, the right of action died with him. It is noteworthy also that in the old common law action on the case for words no distinction was made between spoken and written defamation. The law had not yet learned to draw a distinction between libel and slander.

The action on the case for words, being thus conceived as a remedy for a private wrong and a substitute for the old remedy in the spiritual courts, did not deal adequately or at all with the public element in defamation. Now, it is manifest that false and malicious speech and writing tends to produce a breach of the peace, and may have a tendency to disturb the security of the State. In the Middle Ages a series of statutes dealing with the offence of *Scandalum Magnatum* had sought to safeguard the peace and welfare of the realm against the dangers that might follow the use of seditious or defamatory words or writing. These statutes were administered by the King's Council. The original statute enacted in 1275 provided:—

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[9] In dealing with defamation, the lawyers and judges seem rather to have had in mind the offence technically known as *detractio* than the related offences of *convicium* and *contumelia.*

'Whereasmuch as there have been afore-times found in the country devisers of tales . . . whereby discord or occasion of discord hath arisen between the King and his people or great men of this realm . . . it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale'.

The provision is noteworthy that the bearer of false news or tales which may occasion discord or slander between the King and his people or the great men of the realm is to be taken and kept in prison *until he hath brought him into court which was first author of the tale*.[10] The statute is plainly designed to put an end to 'Rumour, painted full of tongues', of which Shakespeare says:—

'Upon my tongue continual slanders ride,
The which in every language I pronounce
Stuffing the ears of men with false reports'.

An Act of Richard II recites the former statute against 'devisers of false news and of horrible and false lies, of prelates, dukes, earls, barons and other noble and great men of the realm whereby great discord hath arisen, and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided', and continues, 'It is accorded and agreed in this Parliament that when any such deviser is taken and imprisoned and cannot find him by whom the speech is moved, as before is said, that he shall be punished, *by the advice of the said Council,* notwithstanding the said statutes'.

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[10] Cf. the dicta in *Earl of Northampton's Case* (1612) 12 Rep. 132 that one can justify a slander if it is mere repetition of what someone else has said.

There is very little evidence of the operation of these statutes during the Middle Ages. Yet a statute of *Scandalum Magnatum* was re-enacted in the reign of Philip and Mary in 1554, and another in 1559, in the reign of Elizabeth, with additional clauses on 'Seditious Words'. The statutes were enforced by the King's Council sitting, we are told, in the Star Chamber. Early in the reign of Elizabeth the statutes were interpreted by the common law courts in the light of the principle that if a statute prescribes a punishment for acts which cause harm to others, an injured party can have a civil action for damages in respect of its breach.

The Council and the Star Chamber, acting pursuant to these statutes, and not hesitating where they thought fit to enlarge their jurisdiction, assumed the power to deal with defamation by words or writing or otherwise, on the ground that it disturbed or tended to disturb the King's Peace or the security of the realm. In his report of the case *De Libellis Famosis,* Coke points out that every libel which is called *Famosus Libellus* is made either against a private man or against a magistrate or public person.

If it be against a private man it deserves a severe punishment, 'for although the Libel be made against one, yet it incites all those of the same Family, Kindred or Society to revenge, and so tends . . . to quarrels and Breach of the Peace'.

If it be against a magistrate or other public person it is a greater offence; 'for it concerns not only the Breach of the Peace, but also the Scandal of Government; for what greater Scandal of Government can there be than to have corrupt or wicked Magistrates to be appointed and constituted by the King to govern his subjects under him? And greater Imputation to the State cannot be, than to suffer such corrupt Men to sit in the sacred Seat of Justice or to have any meddling in or concerning the Administration of Justice'.

Truth, says Coke, is no defence: 'It is not material whether the Libel be true or whether the party against whom it is made be of a good or ill Fame; for in a settled State of Government the party grieved ought to complain for every Injury done him in an ordinary Course of Law, and not by any means to revenge himself either by the odious course of Libelling or otherwise. . . . And of such Nature is Libelling, it is *secret* and robs a man of his good name,[11] which ought to be more precious to him than his life'.

In criminal proceedings for libel in the Star Chamber, then, truth was no defence. And the fact that the person libelled was dead was no bar to a prosecution. 'A Libelle is a breach of the Peace . . . and the offence to the State dyes not'.

In his book on the Star Chamber Hudson draws a distinction between written and spoken libel which, in the view of Professor Holdsworth may be one of the roots of the modern distinction between libel and slander: 'I desire to observe one difference, which standeth with the rules of law and reason, which, under favour, I have ever conceived to be just, that upon the speaking of words, although they be against a great person, the defendant may justify them as true; as in all actions *de Scandalis Magnatum,* which are properly to be sued in the Star Chamber as in any other Court, and he shall there be received to make the truth appear. But if he put the Scandal in writing, it is then past any justification, for then the manner is examinable and not the matter'. If the words which are conceived to be spoken, even though defamatory, are not seditious words, the distinction that Hudson makes will hold, and may help to explain the modern distinction in this respect between libel and slander. Libel is at once a crime and a tort. Slander is a tort and no crime.[12] One may also note that in addition to punishing the Defendant by fine or imprisonment the Star Chamber sometimes awarded damages to the complainant or plaintiff, perhaps on the principle already stated, that if a statute prescribes a punishment for acts causing harm to others, an injured party can have an action for damages in respect of its breach.

The law of libel that was thus elaborated in the Star

[11] The reference is plainly to 'detractio' as opposed to *convicium* or *contumelia.*

[12] The law of libel did not observe the *mitior sensus* rule and did not require proof of special damage. The *mitior sensus* rule and the rules about words actionable *per se* and actionable only on proof of special damage remained in force in cases of slander.

Chamber derived from the statutes of *Scandalum Magnatum*, and rules as to seditious libel, with an admixture (one imagines) of analogies drawn from the principles of the common law and from the action on the case for words. There were also the proclamations which governed the printing and the publication of books, the enforcement of which lay with the Council and the Star Chamber and (in matters of theology) with the High Commission. In the current view of the law all printing was a crime unless the work had been previously licensed.

In the year 1641 the Star Chamber and the Court of High Commission were abolished. The system of licensing books was maintained by statute until 1694, when it was allowed to lapse. The Courts of Common Law, one may say, inherited upon these topics the law that had been elaborated and administered by the Council and the Star Chamber. The licensing system having come to an end, the common law judges were called upon to exercise control of printing and the press by means of the law of libel.

Until the year 1792 we have the authority of Sir James Stephen for saying that 'a seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever'. During this period the ruler and the great men of the realm were naturally thought to be good and wise men, superior to the common folk. To criticise or censure them openly was to diminish their authority. 'Let all men', it was said in the Star Chamber, 'take heed how they complain in words against any Magistrate, for they are gods'.

'There is a mystery (with whom relation
Durst never meddle) in the soul of State,
Which hath an operation more divine
Than breath or pen can give expressure to'.[13]

In *Tutchin's Case*[14] Lord Holt declared: 'If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist. For it is very necessary for all Governments that the people should have a good opinion of it. And nothing could be worse for any Government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no Government can be safe without it'.

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[13] Troilus and Cressida. Act 3, sc. 3, l. 202.
[14] (1704) 14 St. Tr. 1095.

On the other hand, if the ruler is regarded as the agent or the servant, and the subject as the wise and good master who delegates his power to the so-called ruler, the situation is changed. 'Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with the servant. In such a state of things no imaginable censure of Government short of a censure which has an immediate tendency to produce such a breach of the peace ought to be regarded as criminal'.

The movement of opinion in England in the eighteenth century was from the first to the second of these positions. The old opinion was represented by Holt and Mansfield; the new opinion by Camden and Erskine. 'If', said Erskine, in *R.* v. *Paine*,[15] 'the people have without possible recall, delegated all their authorities, they have no jurisdiction to act, and therefore none to think or write upon such subjects; and it would be a libel to arraign Government or any of its acts before those who have no jurisdiction to correct them. . . . But no legal argument can shame the freedom of the press in my sense of it, if I am supported in my doctrines concerning the great unalienable right of the people to reform or change their Governments. . . . Other liberties are held under Government, but the liberty of opinion keeps Governments themselves in due subjection to their duties'.

The old law of libel, as represented by Holt and Mansfield, had accepted the view that all authority was with the ruler and that any censure on his actions was therefore libellous. The actual operation of the law of libel tended accordingly to restrict liberty of discussion in a way which was inconsistent with the view of Erskine, which had come to represent the prevailing public opinion. Here was the hinge of the controversy which ended in the passing of Fox's Libel Act, 1792. Was the judge to rule whether the words and innuendos proved before the jury constituted a libel? Or was the jury to be entitled to give a general verdict on the whole matter, to decide whether the writing published with the meaning it bore was in law a libel?

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[15] (1792) 22 S.T., at p. 437.

Wedderburn pointed out that as matters stood it was not possible to enforce the law: 'Juries, thinking their laws and liberties to be at stake, and judges imagining their honour and their authority as well as the law and the constitution to be concerned, neither will give up the contest, till the land become one scene of anarchy and misrule. Indeed who does not see that this is already the case? The most audacious libellers cannot be convicted'. Juries were the best tribunal to decide the question of libel or no libel. . . . 'It depends solely on the opinion which is entertained of the libel by the public. . . . So changeable is the nature of a libel, so much does it assume the chameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinion. There is no other standard by which it can be measured or ascertained. Who then so proper as the people to determine the point?'[16]

The controversy was set at rest by the passing of Fox's Libel Act in 1792. The Act was made declaratory in form in order to convey the meaning that 'the law which the courts had in fact made ought to have been made otherwise than it was'. The Act ensures to a person accused of libel the protection which springs from the right of the jury to give a general verdict, and the protection which arises from the right of the court to adjudge whether the words complained of are capable of bearing a defamatory meaning.

Since the passing of Fox's Libel Act in 1792 the courts and the legislature have done much to develop and amend the law of libel. In conformity with the political principles which lay behind the Act the courts have in a series of cases commencing in 1793 and ending only the other day defined the right and liberty of Everyman to comment honestly on any matter of public interest. The acts of any man who *has made himself a publicist* in some manner become *eo ipso* matter for the free comment of his fellow citizens. During the same period the courts have developed the law as to privilege—absolute privilege and qualified privilege—absolute immunity or defeasible immunity—of which the first faint beginnings may be traced to the Tudor time.

The constitutional issues that were raised in the great case of *Stockdale* v. *Hansard*[17] were set at rest by the Parliamentary Papers Act, 1840, which enacted that reports, papers, votes and proceedings published by authority of either of the Houses of Parliament shall be absolutely privileged. The same statute confers qualified privilege on those who print and publish bona fide and without malice any extract from or abstract of such report, paper, vote or proceeding.

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[16] *Parl. Hist.*, 16, 1288–1289.

The broad principle on which the defence of qualified privilege is founded has been stated in more than one decided case to be that 'a man has a right to publish, for the purpose of giving the public information, that which it is fit and proper for the public to know'.[18] The principle is one of general application and is not confined to reports of parliamentary or judicial proceedings. The court must adapt the law to the necessary conditions of society and must 'from time to time apply as best it can what it thinks is the good sense of rules which exist, to cases which have not been positively decided to come within them'.[19] The tendency of some textbooks and of some statutes to set out a catalogue of cases in which qualified privilege is said to exist has been rightly criticised. Certain paragraphs of the recent report of the Porter Committee on the Law of Defamation[20] may perhaps fall under the same criticism. As Sir Valentine Holmes has lately said[21]: 'There is no justification for substituting a catalogue for a principle'.

The criticism that has just been made refers particularly to the provisions of section 4 of the Law of Libel Amendment Act, 1888, which confers qualified privilege on fair and accurate reports published in a newspaper of the proceedings of public meetings of certain categories. Social and administrative changes since introduced have rendered these categories inadequate and (according to the recommendations of the Porter Committee) they require to be largely extended. The committee proposes to reclassify the extended list of reports which will be entitled to qualified privilege into two categories, namely, those which shall entitle the person defamed to a *droit de réponse* in the newspaper, and those which will not give any such right or impose any such burden on the newspaper.

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[17] (1839) 3 A. & E. 1.

[18] *Cox* v. *Feeney* (1863) 4 F. & F. 13; *Allbutt* v. *G.M. Council* (1889) 23 Q.B.D. 400, at p. 412.

[19] *Usill* v. *Hales* (1878) 3 C.P.D. 319, at p. 327.

[20] Cmd. 7536 (1948).

[21] *Journal of the Institute of Journalists,* November 1949.

Other provisions of the Law of Libel Amendment Act, 1888, confer on the proprietors of newspapers special privileges which are also open to criticism. Thus section 3 of the Act, according to the common interpretation, confers absolute privilege on a newspaper which publishes libellous matter in the form of a contemporaneous report of any judicial proceeding. Such matter may, on this view of the Act, be published with impunity, even though there be actual malice towards the person defamed, without entailing any civil or any criminal consequence. 'Anything more unjust or pernicious or inimical to public welfare cannot well be imagined', says Mr. Spencer Bower, in his admirable work on Actionable Defamation.[22]

Another provision of the statute[23] enacts that at the trial of an action on libel contained in any newspaper the defendant shall be at liberty to give evidence in mitigation of damages that the plaintiff had already recovered (or has brought actions for) damages or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought. This special privilege of newspapers is declared by Mr. Spencer Bower to be 'peculiarly unjust': 'A particular libeller is being sued. What business of his is it that another disseminator of the same libel has already paid the penalty for his misdeed? He is being sued for his own. Why should a tale-bearer suffer less, as between himself and the person he has libelled, because there has been a tale-maker before him, or another tale-bearer with him? Why should Snake get off more cheaply because Lady Sneerwell, his principal, or Mrs. Clackitt, his agent, has told the same lie and had to pay for it?'

These statutory privileges conferred on newspapers are inconsistent with ancient principles of the common law, and it is not easy to resist the criticisms that have been made by Mr. Spencer Bower upon this matter.[24]

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[22] Second edition (1923), p. 408.

[23] 51 & 52 Vict., c. 64, s. 6.

[24] One may here call attention to a rule of practice in favour of newspapers which has been tolerated by the Courts, though it is unjustifiable in principle and likely in particular instances to lead to injustice; the rule of practice that a newspaper is not compelled to disclose the name

The defence of truth (or justification, as it is called) raises another matter that needs consideration. By Lord Campbell's Act, 1843, truth is made available as a defence in proceedings for criminal libel, if the defendant is able to prove to the satisfaction of the jury that it was for the public benefit that the defamatory matter should be made known.

In the Draft Bill of 1843 Lord Campbell and other eminent judges had proposed that in civil action for libel and slander the defence of truth should no longer avail unless the defendant was able to satisfy the court and jury that it was for the public benefit that the defamatory matter should be made known. To this proposal the Attorney-General of the day demurred, and the proposal was rejected. A similar proposal for reform of the defence of truth in a civil action for libel or slander was lately considered by the Porter Committee on the Law of Defamation. The Report of the Committee cites as a hypothetical instance the case of a woman who, in adolescence, bore an illegitimate child and has since become a highly respected member of the community. Even in face of such a flagrant instance the committee declined from the proposal for reform. 'In this way', as Sir Valentine Holmes has said, 'an anomaly was perpetuated'.[25]

Another measure of reform that has been desiderated by some of the greatest judges and historians of the law remains to be effected. It is the assimilation of the old artificial law of slander to the more modern and more logical law of libel. The reform, one would have thought, was made urgently necessary through the development of broadcasting. The Porter Committee considered the matter, but limited its recommendation to the proposal that all defamatory broadcast statements should be treated as libel, with a minor recommendation that words naturally tending to injure or prejudice the reputation of a man in his office, profession or trade should be actionable without proof of special damage whether or not they were spoken of him in the way of his office, profession or trade. And so, in

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of the person who supplied the material or who wrote the article of which complaint is made. In *Lyle-Samuel* v. *Odhams* [1920] 1 K.B. 135 (C.A.) the rule of practice was applied in a case where it manifestly worked injustice; and though Lord Justice Scrutton criticised the rule he felt unable to 'disestablish it after thirty years existence'. An appeal from the Court of Appeal to the House of Lords led to an offer by the newspaper and the settlement of the action.

[25] *Journal of the Institute of Journalists,* November 1949.

the words of Professor Holdsworth, 'the division of the tort of defamation into libel and slander . . . still disfigures the law. But the definition of the tort of libel was on the whole satisfactory; and it has formed a good starting point for the development of, and a sufficient framework for the many detailed rules which the modern expansion of literature and journalism has necessitated. If the rules applicable to libel were applied to all kinds of defamation, and the fact that the defamation was oral was only allowed to weigh in considering the measure of damages, no serious complaint could be made against our modern law'.[26]

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[26] H.E.L., 8, 378. See, too, Spencer Bower on *Actionable Defamation*, 2nd ed. (1923), pp. 462–464.

7

TRADE PROTECTION AND MONOPOLY

R. A. Eastwood

I MIGHT have chosen for this paper an alternative title which would have been: 'The Changing Conception of Public Policy as Illustrated by the Modern Trade Protection Agreement'. That would have been rather a cumbersome title, but it is descriptive of my present theme.

In the case of *Vancouver Malt and Sake Brewing Company, Limited* v. *Vancouver Breweries, Limited,*[1] Lord Macmillan, speaking in the Privy Council of the doctrine which is known as restraint of trade, said[2]: 'The scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not constant'. I know of no better illustration of the truth of this statement than the development of the modern trade protection agreement, that is, an agreement by which a number of firms and companies in a particular trade or industry, sometimes the whole of those firms and companies, agree to act together for the protection of their mutual trading interests.

I do not propose to deal at length with the theoretical aspects of the doctrine of restraint of trade. They are adequately presented by the textbooks. But, for the sake of my own argument, I must remind you of a few landmarks in the history of that doctrine. You know that originally the common law was very jealous of any contractual provision which might operate in restraint of trade. It held, generally, that it was in the public interest that everybody should be allowed freely to use his skill and to ply his trade as he wished and, therefore, restraints on such freedom were void. They tended to create monopolies which the common law abhorred.[3] I like particularly the case of *Colgate* v. *Bachelor,*[4] where it was held that it was illegal 'to prohibit or restrain any to use a lawful trade at any time or at any place' and Anderson, C.J., added that a man might as well bind himself not to go to Church. Freedom of trade was as sanctified as the State religion by law established.

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[1] [1934] A.C. 181.
[2] *Ibid.*, at p. 189.
[3] See *Tailors' of Ipswich Case* (1615) 11 Co.Rep. 53b.
[4] (1602) Cro. Eliz. 872.

Before long there came a change of view. It came to be recognised that some restraint of trade might be justified. A master, for instance, might have little inducement to instruct an apprentice if, later, the apprentice could trade in competition with the master; and a would-be purchaser might hesitate to buy the goodwill of a business if the vendor could set up a competing business next door.

Consequently, the idea grew that a restraint which was reasonable and was based on consideration might be valid. Then came a distinction between general restraints and partial restraints. General restraints were thought to be invalid on the ground that they were not reasonable and tended to monopoly which was contrary to public policy. Partial restraints, however, might be valid if they were reasonable.

In the interval, however, economic life was developing and certain commercial activities were acquiring world-wide implications; and so, ultimately, there was heard the leading case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[5] It was there held that even a world-wide restraint might be valid provided that it satisfied certain tests. Read the classic judgment of Lord Macnaghten in that case, and you will see that he rejects the suggestion that there is any difference, so far as fundamental legal principles are concerned, between restraints which are general and those which are partial. 'My Lords', he says,[6] 'I think the only true test in all cases, whether of partial or general restraint, is . . . what is a reasonable restraint with reference to the particular case?' Earlier in his judgment[7] he had defined a reasonable restraint in these terms: 'All interferences with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade . . . may be justified by the special circumstances of the particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public'. That judgment clarified the law with regard to restraint of trade for several generations to come. Nevertheless it was not the last word on the subject, and public policy has developed considerably since 1894.

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[5] [1894] A.C. 535.

[6] *Ibid.*, at p. 574.

[7] *Ibid.*, at p. 565.

You will notice that in the first passage which I have quoted from the judgment of Lord Macnaghten he referred to 'what is a reasonable restraint with reference to the particular case'. A new type of case has become prominent since 1894. It is the case of a trade protection agreement in which a number of manufacturers or traders agree to act in concert, and according to the decisions of the majority of them, in order to secure an adequate price for their products and to protect their trade interests. Such an agreement is obviously in restraint of trade because every party to it agrees that he will refrain from doing what the majority forbids. I do not say that such agreements did not exist before 1894, but what I do say is that commercial and industrial organisation has developed so considerably since that date that agreements of the type to which I refer have become common and their validity has been tested several times in the courts. The result of the cases in which it has been tested is that, whilst the old phraseology has been retained and the judges have repeated, sometimes almost verbatim, the language of Lord Macnaghten in the *Nordenfelt Case,* they have regarded the trade protection agreement as a 'particular case' deserving of a special and particular application of the principle of reasonableness.

I have not time to refer to all the decisions, but particularly I would like to call your attention to the *North West Salt Company* v. *Electrolytic Alkali Company.*[8] One of the questions involved in that case concerned the validity of an agreement between manufacturers of salt for the purpose of regulating the supply of their products and maintaining prices. Lord Haldane said[9]: 'When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice, has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interests of the public, but it regards the parties as the best judges of what is reasonable between themselves'.

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[8] [1914] A.C. 461.

Permit me to return for a moment to the judgment of Lord Macnaghten in the *Nordenfelt Case*. You will remember that he gave a double test of reasonableness and the restraint, in order to be valid, must, according to him, be both (1) 'reasonable in reference to the interests of the parties concerned' and (2) 'reasonable in reference to the interests of the public'. But, according to Lord Haldane in the *Salt Case*, the first of these tests is automatically satisfied in the case of a trade protection agreement because the law 'regards the parties as the best judges of what is reasonable between themselves'.

What then of the other test, the interests of the public? I will refer you to a case decided a few months earlier, that of the *A.-G. of Australia* v. *Adelaide Steamship Co.*[10] The facts of that case are not material to the present discussion, but in the course of his judgment Lord Parker said[11]: 'Although the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce . . . a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent'. But he added this: 'It is clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties the onus will be no light one'.

In other words, to return again to the *Nordenfelt* tests, the parties themselves are, on the authority of Lord Haldane, the judges of the first and, with regard to the second, it is for anybody who alleges that it is not satisfied to prove his allegation, and, according to Lord Parker, 'the onus will be no light one'. Could you have a better assurance of the validity of the ordinary trade protection agreement?

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[9] *Ibid.*, at p. 471.
[10] [1913] A.C. 781.
[11] *Ibid.*, at p. 796.

These trade protection agreements are in practice very complicated documents. If your information is acquired solely from textbooks you are apt to assume that all that they do is to provide for price maintenance. Provision for price maintenance is in fact a very important aspect of most of them, but they contain provision for other things as well.

Very often they prescribe standard terms and conditions of trade. The members of the association which an agreement establishes are bound by the agreement to observe those terms and conditions, and in consequence other people are unable to deal with members except on those terms and conditions. And, with regard to the interpretation of the terms and conditions, it is frequently provided that any dispute shall be referred for the arbitration or decision of a body established by the agreement itself.

Then again some of these agreements establish what is known as a pool and quota system under which each trader is given a quota based on his turnover for the previous year or a previous period of years. If, in the ensuing period, his output exceeds his quota he must put his profits or a proportion of them into a pool for the compensation of other members who have been less fortunate. On the other hand, if his output is less than his quota, he is entitled to draw compensation from the pool.

Then, again, there is a new type of agreement which is becoming prominent at the present time. It is an agreement which introduces what is called a redundancy scheme. Redundancy schemes are designed to operate in industries in which plant and machinery have become obsolete or potential capacity is deemed surplus to economic requirements. They vary in detail; but in broad outline such a scheme provides that during the period of the agreement a trader who is a party to it will not sell his premises or his goodwill or his machinery except to a 'Disposals Board' established by the parties to the agreement itself. If the Board purchases it may resell, but it must exact a covenant from its purchaser not to engage in the industry concerned for a period of years. On the other hand, any member who sells to the Board must himself covenant not to operate in that industry for a stipulated period. In return he is compensated partly by the purchase price which the Board pays to him and partly from a contribution from a fund constituted from levies on those traders who remain in the industry.

It will be seen, therefore, that agreements of the kind which I am discussing may be very comprehensive, and it should be noticed also that, although the schemes which they establish arise out of agreement between the members themselves, they may, and usually do, affect in their operation members of the public.

Another aspect which is interesting arises from the enforcement of these schemes. The ordinary student is apt to get the impression that any question arising from these agreements has to be determined by the courts. As a rule that is not so. If the question concerns the validity of the agreement itself, of course, only the courts can decide it; but if a person accepts the validity of the agreement which he has made, then, in practice, it is otherwise, and the vast majority of business men do accept the validity of their own pledged word. Consequently, the questions which arise in practice relate not to the validity of the agreement but to its interpretation. Above all, does what a member has done constitute a breach of the agreement? The courts are competent to decide such a question; but, rightly or wrongly, the business man does not like the courts and shows a strong tendency at the present time to resort in commercial disputes to arbitration or to the decision of some domestic tribunal. There are several reasons for this, but by no means the least of them is the fact that business men do not want to have their trade secrets discussed in open court. That reason operates particularly strongly in the case of such agreements as those which I am now discussing, because in practice their operation involves the obligation on each member to supply periodically highly confidential information concerning his own business and, not infrequently, that of his business associates.

Consequently most trade protection agreements provide that an alleged breach shall be heard by a domestic tribunal established by the agreement itself. Usually that domestic tribunal is the committee of the association, but not infrequently it is a special sub-committee. In any case it is a domestic tribunal, and this raises some interesting legal points.

In the first place, how must a domestic tribunal conduct itself? It has been decided that it is not bound by ordinary rules of evidence and procedure. On the other hand, it is bound and, so far as I can see, it is only bound by what is called the principles of natural justice. It must give a man an opportunity to be heard and to know what is alleged against him; it must not act upon impossible evidence, and so on. But beyond that it has very wide powers. Lord Atkinson in *Thompson* v. *B.M.A. (N.S.W. Branch)* [12] said [13]: 'If any body rightly convened and properly composed is burdened with the discharge of some judicial or quasi-judicial duty affecting the rights, liberties or properties of a subject, and makes, as the result of a just and authorised form of procedure, a decision it has jurisdiction to give, that decision, if legal evidence be given in the course of the proceeding adequate to sustain it, cannot, in the absence of some fundamental error, be impeached or set aside, save upon the ground that this body was interested, or biased by corruption or otherwise, or influenced by malice, in deciding as it did decide'. That gives to a domestic tribunal a very wide authority. In short, its decision is valid unless it contravenes the principles of what is known as natural justice. In my experience the framers of some of these agreements have been so anxious to guard themselves against any charge of such contravention that they have provided an appeal from the committee or sub-committee which first decides the case to a tribunal consisting of independent persons. Cases of that kind, however, are exceptional.

Another question which arises is: What kind of sanctions may a domestic tribunal impose? Sanctions may take many forms, so long as natural justice is not infringed. The simplest is, of course, expulsion, but that is not a penalty which finds much favour with the promoters of these agreements. On the one hand, it is a very severe penalty, because it might involve completely precluding a man from the effective exercise of his trade. On the other hand, it might not be a desirable sanction, because the economy of the whole group might be disturbed by the expulsion of a member, particularly if he is a member who has done a substantial amount of trade. Therefore, the normal sanction in my own experience is damages. Most of the earlier agreements contained a simple provision to the effect that any member found to have committed a breach of the agreement should pay to the association a stated sum, *e.g.*, £200, in respect of each established breach. That has led to an interesting discussion among the framers of these agreements whether such a provision establishes a penalty or liquidated damages. As you know, if the sanction is to be regarded as a penalty it cannot be recovered. My own personal view is that, provided that the sum is not made unreasonably high, it must be regarded as liquidated damages. It must be remembered that the actual estimation of damage in these cases is a very difficult matter, and my own view is that a reasonable sum fixed in advance would be regarded as a genuine pre-estimate of the loss which would follow a breach.[14] Ultimately the question is one which can only be settled by the courts but, as I have already stated, to the courts a business man does not wish to go, and he pays the sum which is awarded against him. Nevertheless, some draftsmen of late have introduced a new technique, and they have provided that the domestic tribunal may award such damages, not exceeding a specified sum, as in the opinion of that tribunal are reasonable, having regard to such matters as the disturbance of trade, the injury inflicted on other members, and so on. That is an attempt to cope with a possible technical difficulty. If ever it comes before the courts I think that it will be found to be valid.

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[12] [1924] A.C. 764.

[13] *Ibid.*, at p. 778.

Another question relating to the enforcement of these agreements is: How can you ensure the observance of your prices and of your standard terms and conditions and of your other provisions by persons who are not themselves parties to the agreement? As you know, by the common law only the parties to the agreement can sue and be sued on it, and *Dunlop* v. *Selfridge*[15] shows that you cannot make restrictive conditions run with goods as you can make restrictive covenants run in equity with land. You are driven, therefore, to other alternatives, and the usual alternative is that the members decide that they will not trade with the offending third party. This raises some interesting questions regarding the tort of conspiracy. On this there has been much litigation, which I have not time to discuss in detail, but the result of the decisions, in my opinion, comes to this: that where the predominant or main purpose of the combination is not that of injury to others but the promotion of the legitimate trade interests of those combining there is no tort, although others may incidentally suffer. That view was recently confirmed by the House of Lords in *Crofter Hand Woven Harris Tweed Company, Limited* v. *Veitch.*[16] In that case Viscount Simon, L.C., said[17]: 'Liability must depend upon ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person'. It is extremely difficult, if not impossible, to show in the type of case which I am now discussing that the predominant purpose is to injure, because the very purpose of the agreement itself is the protection of trade interests.

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[14] For a discussion of the cases on penalties and liquidated damages see Cheshire and Fifoot, *Law of Contract* (2nd ed.), p. 453 *et seq.*

[15] [1915] A.C. 847.

This brings me to another aspect of my topic. If your members can decide not to trade with a particular individual, why can they not also decide to refuse to trade with a number of individuals? Consequently, we must consider the 'stop list', that is, a list of names of traders with whom the association has decided not to deal, which is distributed to all the members of the association in order that they might know the decisions of the association. This obviously is a device which can be used against the association's own members, as well as against other parties. One aspect of the validity of the 'stop list' was settled as long ago as 1921 in the case of *Ware and De Freville, Limited* v. *Motor Trade Association.*[18] In that case the plaintiff's name had been published in a 'stop list' which had been circulated to members of the Motor Trade Association. He alleged that the publication constituted a libel, and he also claimed an injunction on the ground that the defendant's action was unlawful as being a threat to injure. With regard to the injunction, it was held that that could not be granted because what had been done was done bona fide for the protection of the legitimate trade interests of the members of the trade association. With regard to the libel, the Court held that in the absence of evidence that the words would be understood in any other than their ordinary meaning they were not capable of being defamatory. Four years later that decision was approved by the House of Lords in *Sorrell* v. *Smith*[19] and the legality of the 'stop list' was settled for all time.

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[16] [1942] A.C. 435.
[17] *Ibid.,* at p. 445.
[18] [1921] 3 K.B. 41.

Before long came another question. Could an association which, after due inquiry, had found it proper to place a person's name on a 'stop list', give him the option, instead of that being done, of paying a sum of money? In *R.* v. *Denyer*[20] Lord Hewart held that so to demand such a sum could amount to demanding with menaces and without reasonable and probable cause within section 29 (1) of the Larceny Act, 1916. That view was overruled in *Thorne* v. *Motor Trade Association*.[21] In that case Lord Wright said[22]: 'There are many possible circumstances under which a man may say to another that he will abstain from conduct unpleasant to the other only if he is paid a sum of money. Thus he may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worth while to pay him rather than have the amenities of his house destroyed by an eyesore. Or a valued servant may threaten to go to other employment unless he is paid a bonus or increased wages. Or a man may offer to abstain from prosecuting for a common assault or infringement of his trade mark if he is paid compensation for a civil wrong or if the other man makes a public apology. . . . Many similar instances may be given'. Earlier in his judgment he had said[23]: 'In the absence of evidence from which an actual intention to injure can be established or inferred, I think the mere fact that a person has been notified by a demand in writing that his name will be placed on the stop list unless he pays a fine and gives an undertaking . . . would not as a rule show a case proper to go to the jury that an offence had been committed under section 29 (1) of the Larceny Act, 1916. The prosecution would be required to establish that there was an absence of reasonable cause in the full sense, that what was done was not done in the promotion of the legitimate trade interests of the association and its members, but that there was an intent to injure, or that the money demanded as an alternative to the name being put on the stop list was extortionate or excessive. The onus is throughout on the prosecution to establish all the elements of the offence. If it appeared on the evidence for the prosecution that though there was a demand in writing with menaces, yet there was reasonable cause in the sense which I have explained, the case should be withdrawn from the jury. If, however, there was evidence of the absence of reasonable or probable cause, then the jury must decide after hearing the whole case'.

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[19] [1925] A.C. 700, at pp. 713, 730 and 747.
[20] [1926] 2 K.B. 258.
[21] [1937] A.C. 797.
[22] *Ibid.*, at p. 820.
[23] *Ibid.*, at p. 818.

That case established the right of a trade association to demand a reasonable payment as consideration for not placing the name of a trader on the 'stop list'. The trader might be either a member or a non-member. In *Denyer's Case* it was a non-member; in *Thorne's Case* it was a member. But the right to demand a reasonable payment from either seems to be established.

The result seems to be that the operation of these agreements can give to those who enter into them effective joint control over a whole industry, so that persons who wish to participate in that industry or to trade with it must conform or not trade at all. I should like to make it clear that I do not suggest that this is wrong. In my own experience I have known agreements of this kind work a considerable amount of good, but that is not my present point. I merely use these agreements as a remarkable illustration of the truth of the words of Lord Macmillan, which I quoted earlier in this lecture,[24] 'public policy is not constant'.

Had there not been passed recent legislation I should have left the matter at that, but recently there was passed the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. I do not propose to discuss that enactment in detail. Its

[24] *Ante*, p. 100.

operation is more restricted than many people think. It establishes[25] a Monopolies and Restrictive Practices Commission to which the Board of Trade may refer certain narrowly defined restrictive trading conditions 'for investigation and report'. It refers to those conditions as arising from (*inter alia*) 'any agreements or arrangements (whether legally enforceable or not)'.[26] The words 'legally enforceable or not' are worthy of note, because they might cover some of the agreements about which I have been talking. But by section 6 (1) (b) of the Act, one of the matters on which the Commission may be asked to report is whether the conditions in question 'operate or may be expected to operate against the public interest'. So we have this rather curious anomaly—an agreement is 'legally enforceable' because it is not contrary to public policy, yet the Act contemplates that it may operate or may be expected to operate 'against the public interest'. It may be possible, and I think that it is, to reconcile the anomaly, but is it not a rather remarkable development of the doctrine of public policy and do not we need a restatement of that doctrine?

In view of this statute it seems difficult to accept literally the classic definition of public policy given by Lord Truro in *Egerton* v. *Earl Brownlow*[27]: 'Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good'. Now we have it on statutory authority that an agreement which is valid because it does not offend public policy nevertheless may in some ways operate 'against the public interest'.

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[25] By s. 1.

[26] Sections 3 (1) (b), 4 (1) (b), 5 (2) (a).

[27] (1853) 4 H.L. Cas. 1, at p. 196.

8

THE LAW OF THE THEATRE

E. R. H. Ivamy

Amongst the delights of the Reasonable Man there may perhaps be classed those of the theatre. But how often does he pause to consider the legal basis upon which the theatre rests? The object of this paper is to present certain aspects of this law.[1] Its scope is limited to straight plays, and for the most part is confined to the London area. The main headings which have been chosen, though not of course exhaustive, are: (1) the licensing of the building and the play; (2) the relationship between management and audience; (3) contracts between management and performers; and (4) dramatic copyright.

(1) THE LICENSING OF THE BUILDING AND THE PLAY

Most West End theatres are under the jurisdiction of the Lord Chamberlain who has been made responsible for making regulations which will now be considered in detail.[2] All doors and barriers must open outwards and the management must allow the public to leave by all exit and entrance doors, which must be thrown open for the use of the audience at the end of the performance. Gangways must be kept entirely free from chairs or any other obstruction. Corridors must not be used as cloakrooms. All exits from the theatre must be plainly indicated in seven-inch letters placed at a height of at least 6 feet 9 inches from the floor level. Curtains must be parted in the centre, and must not trail on the floor. All doors must have a notice clearly painted on them indicating the method of opening them. All gangways must be maintained with non-slippery surfaces. Any advertisements on the wall must be kept flat or kept 6 feet 9 inches above the floor.

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[1] I wish to acknowledge at the outset my great debt to Mr. Nugent, the Comptroller of the Lord Chamberlain's Office, and to Mr. Gordon Sandison, the General Secretary of the British Actors Equity Association for the help that they have given me in the preparation of this paper.

[2] Rules and Regulations with regard to theatres in the jurisdiction of the Lord Chamberlain.

An ample water supply must be available to all parts of the house. The safety curtain must be lowered daily in the presence of the audience about the middle of each performance. Whenever the curtain is lowered, all lights which are not controlled from the stage switchboard must be lighted. Rugs and buckets filled with water must be always kept in the wings and the flies. A report of any fire, however slight, must be sent at once to the Lord Chamberlain and the fire brigade. At least one employee must be a man of practical experience in fire prevention and extinction. He must act as fireman and must wear a fireman's uniform. He must remain within the stage risk whilst the premises are open to the public. He must keep a log book to record the due performance of his duties, and this must be initialled by the licensee or manager weekly. A sufficient number of employees must have definite duties allotted to them in the event of fire or panic, and statements of their duties must be posted up in conspicuous positions. Dry fire drills must be held at least once a week in all theatres under the direction of the fireman or manager.

The lighting, electrical and heating installations must be in accordance with the regulations of the London County Council. An electrician must remain in charge of the electrical installation during the whole time that the public are on the premises. A certificate by a qualified engineer that the whole electrical installation is in a safe working condition must be submitted to the Lord Chamberlain once in fourteen months. A plan or diagram of the electrical arrangements must be kept in an accessible place, *e.g.*, the manager's office.

Except with the consent of the Lord Chamberlain, the seating area assigned to each person shall not be less than 2 feet 6 inches deep and not less than 1 foot 8 inches wide, and no seat must be more than 10 feet away from a gangway. Explosives or highly inflammable substances must not be used if the desired effect can be obtained by electrical or mechanical means. No explosives other than 500 safety cartridges or 1 lb of gunpowder may be upon the premises at any one time. Care must be taken to ascertain that firearms do not contain any article or substance which might serve as a missile, and that they are not directed towards any person, scenery or combustible material. In connection with the use of petroleum for the purpose of any engine or machine, the maximum amount allowed is half a pint, and a further pint only may be stored elsewhere on the premises. Inflammable gases for airships or balloons or for any other purpose must not be used without the consent of the Lord Chamberlain, to whom seven days' notice must be given of any proposal to use them.

Special care must be taken to ensure the safety of children at public entertainments. When a special performance is put on for children, or there is one at which the majority of the audience are children, and the number of children exceeds 100, there must be a sufficient number of adult attendants properly instructed as to their duties to control the movements of children to and from their seats, and to prevent more children or other persons being admitted to the building than can be accommodated.[3]

A licence for the theatre is only required when the building is to be used for public performances,[4] and this is a question of fact in each case. Thus a performance given to the doctors and staff of Guy's Hospital was held to be a private entertainment, even though friends of the performers were given free tickets and a representative of the Press was present.[5] Similarly, no licence is needed for a public performance of a play which is managed or conducted under the authority of a Secretary of State or the Admiralty.[6]

For most West End theatres application for a licence has to be made to the Lord Chamberlain.[7] The licence can only be granted to the actual and responsible manager for the time being. His name and address must be printed on every playbill. He must enter into a bond not exceeding £500, and provide two sureties who are bound in a penal sum not exceeding £100.[8] The fee payable on the grant of a licence is fixed by the Lord Chamberlain and must not exceed ten shillings for every calendar month during which the theatre is to be kept open.[9] Application must be made fourteen clear days before the day for which the licence is required, and must contain the names and addresses of the manager and proposed sureties. Licences will only be granted in respect of buildings where the Rules and Regulations[10] imposed by the Lord Chamberlain can be carried out, and which are structurally safe. Theatre licences usually remain in force for one year unless revoked or suspended, *e.g.*, for any breach of the regulations or in cases where any riot or misbehaviour has taken place, whereupon the Lord Chamberlain can order the theatre to be closed.[11]

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[3] Children and Young Persons Act, 1933, s. 12; the section does not apply to any entertainment given in a private dwelling-house.

[4] Theatres Act, 1843, s. 2.

[5] *Duck* v. *Bates* (1884) 13 Q.B.D. 843; Bowen, L.J., at p. 850: 'In the present case the nurses and attendants of the hospital spend their lives in endeavouring to relieve the pain of sufferers, and persons of a kind disposition were endeavouring to lessen the monotony of the service. . . . There was therefore no appropriation of the building even for the occasion to the entertainment of any portion of the public: it was to be an entertainment of a domestic character. It is true that on the last occasion of the representation the members of the amateur dramatic club brought their friends, but I think that this was nothing more than the friendly admission of a limited portion of a domestic audience. Reporters were asked, and one came, but the object was not to entertain the public or to perform to the public, but merely to describe to the public the performance which had already taken place. . . . The question must be to a certain extent a question of fact'.

[6] Army (Annual) Act, 1889, s. 7.

[7] The Theatre Royal in Covent Garden is licensed by Letters Patent, and no licence from the Lord Chamberlain is needed.

A person who keeps an unlicensed theatre for the public performance of stage plays renders himself liable to a fine not exceeding £20 a day for every day it remains open.[12] Actors who act in such a theatre are liable to be fined £10 a day, but in all cases the prosecution must be commenced within six months of the offence.[13] In the Metropolitan District, constables authorised in writing by the Commissioner of Police may enter any unlicensed theatre and take into custody all persons found on the premises.[14] If there has been a contract to perform at a theatre known to be unlicensed, neither the manager nor the actor can bring an action to enforce it.[15]

In addition to the theatre licence, application must be made for a licence for the play itself. The term stage play has been statutorily defined as including 'every tragedy, comedy, farce, opera, burletta,[16] interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof'.[17] It is obvious

[8] Theatres Act, 1843, s. 7.
[9] *Ibid.*, s. 4.
[10] See *supra*, p. 113.
[11] Theatres Act, 1843, s. 8.
[12] *Ibid.*, s. 11.
[13] *Ibid.*, s. 22.
[14] Metropolitan Police Act, 1839 (2 & 3 Vict., c. 47), s. 46.
[15] *Gallini* v. *Laborie* (1793) 5 T.R. 242.
[16] 'A comic opera: a musical farce' (*Oxford Eng. Dic.*, Vol. 1).
[17] Theatres Act, 1843, s. 23.

that whether a particular performance comes within this definition is a question of fact. An interesting case is *Day* v. *Simpson*.[18] The performance is described in the reports as being a 'composed set drama with a regular plot of love, courtship and matrimony'. On the rising of the curtain there was a representation of a storm at sea and of a man swimming. This was not a living person but a 'double' of a prince. When the storm subsided a drop-scene was disclosed with a clear lake in the background. A character then appeared in the costume of a Greek prince and described how he had escaped being drowned. Later another person came on the stage and spoke to him. The latter was described by witnesses as a 'low comedian'. Their conversation was unimportant, and they were the only persons who appeared bodily on the stage. There were several other characters, including a king, a princess and a chorus, but they acted their parts in a room beneath the stage, and addressed each other in the words allotted to them. Every action was reflected on to the stage by means of an ingenious system of lenses and mirrors. There was no change of scenery during the performance, but there was dancing, music and singing. The court held that this constituted a stage play.

Every new stage play and every new act, scene or other part added to any old play which is intended to be produced and acted for hire in any theatre in Great Britain must first be approved by the Lord Chamberlain.[19] One copy of the play must be sent by the manager at least seven days before the first performance. A scale of fees has been laid down, the maximum charge being two guineas.[20] The Lord Chamberlain has a complete discretion. Some of the grounds on which a licence will be refused are set out in the Regulations. Thus there must be no profanity or impropriety and no indecency of dress, dance or gesture on the stage. No offensive personalities or representations of living persons are permitted, nor anything calculated to produce riot or breach of the peace. No alteration in the title is allowed and no modification in the play may be made without permission.

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[18] (1865) 18 C.B.N.S. 680.

[19] Theatres Act, 1843, s. 12.

[20] *Ibid.*, s. 13. The Lord Chamberlain's Regulations for the submission of Stage Plays: There is no other form of censorship. Cf. *The Times* newspaper, December 9, 1949, for the reactions of the National Coal Board to 'Castle in the Air'.

Copies of all playbills must be sent to the Lord Chamberlain's office every Monday, and when a change of performance is announced. Both managers and actors who commit an offence against the regulations can be punished by a fine of £50,[21] and the justices have power to order that the licence of the theatre shall become void or suspended for a period.[22]

(2) THE RELATIONSHIP BETWEEN MANAGEMENT AND AUDIENCE

The relationship between management and members of the audience is naturally a wide and varied one, and it is here possible to pick out certain only of its more important aspects.

(a) *Right of Admission.* No member of the public can demand that he be allowed to enter a theatre as of right. 'A theatre stands on a wholly different footing from a public inn, or a public service such as a railway. A public inn, for example, is under a common law duty to supply all who come, provided that accommodation exists, and provided that the guest is of proper character and behaviour. But a theatre stands upon a wholly different footing. It may sell or refuse to sell tickets at its own option'.[23] Any one who purchases a ticket has the right to see the whole performance provided he behaves properly.[24] If a person knows that the management will refuse to sell him a ticket, and he gets a friend to purchase a ticket for him, the management may still refuse him admittance, because the personal element in the contract is material.[25] If a member of the audience, having paid his money, goes into the theatre and finds that there is no room, he should walk out and get his money back. He has no right to occupy a seat in another part of the theatre, and if he does so the management has the right to remove him, but only a reasonable amount of force may be used.[26] If one of the audience leaves his seat, it is possible that he can retain it by placing an article upon it even though it is not reserved.[27] In cases where he has purchased his seats beforehand and finds that they have been sold again to someone else, he is entitled to damages.[28] The Lord Chamberlain's Rules and Regulations state that managers must do what is reasonably necessary to acquaint persons waiting in queues for admission of the likelihood of their obtaining seats.

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[21] Theatres Act, 1843, s. 15.

[22] Criminal Justice Act, 1925, s. 43; prosecution for such offences must be commenced within six months. Theatres Act, 1843, s. 22. For the unlawful wearing of military and naval uniforms and decorations, see The Uniforms Act, 1894, Air Force (Application of Enactments No. 2) Order, 1918 (S.R. & O. 1918 No. 548), and Army Act, s. 156A.

[23] *Said* v. *Butt* [1920] 3 K.B. 497, 502 (McCardie, J.).

[24] *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.

[25] *Said* v. *Butt* [1920] 3 K.B. 497.

[26] *Lewis* v. *Arnold* (1830) 4 C. & P. 354.

(b) *The Right of Criticism.* 'The audience have certainly a right to express by applauses or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy'.[29] In another case Tindal, C.J., said that he believed 'that no persons are more anxious that the public should have that right than the actors themselves, for if it were laid down that persons who exercised their free judgments would be subject to actions for damages, not only would it be fatal to the actor on the stage, but it would prevent persons from frequenting the theatre at all'.[30] The audience may give expression to its feelings not only with reference to what is taking place during the performance, *e.g.*, the particular situation in a play, but may also express its opinion on the merits of the play or entertainment generally.[31] When an actor is frightened to appear on the stage on account of a libel published concerning him, the management have no cause of action against the writer of the libel. The only remedy is to sue the actor for breach of contract.[32]

(c) *The Right of Personal Safety.* The management owes the usual common law duties to members of the public who enter the premises. The duty is highest in the case of those who purchase an admission ticket, the rule being laid down in *Francis* v. *Cockrell*,[33] where Kelly, C.B., says: 'one who lets for hire . . . a place to be sat in by anybody who is to witness a spectacle for a pecuniary consideration does warrant and does impliedly contract that the . . . thing is reasonably fit for the purpose for which it is to be applied, but secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination'.[34] Towards invitees the rule in *Indermaur* v. *Dames*[35] applies, and the management must 'take reasonable care to prevent damage from unusual danger of which it knows or ought to know'. Invitees, *i.e.*, those who enter the premises on any matter of business or common interest would include actors attending rehearsals without payment with a view to obtaining employment.[36] Those who enter the premises with the permission of the management but not on any matter of business or common interest are in the position of licensees, and the management need only warn them against traps of which it knows. Any other person coming on the premises is a trespasser, and must take them as he finds them, but the management must not deliberately create a danger with 'reckless disregard of the presence of the trespasser'.[37]

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[27] Strong, *Dramatic and Musical Law* (3rd ed.), p. 51; but see Winfield, *Textbook of the Law of Tort* (4th ed.), p. 308.

[28] Strong, *ibid.*, pp. 51–52.

[29] *Clifford* v. *Brandon* (1810) 2 Camp. 358.

[30] *Gregory* v. *Duke of Brunswick* (1843) 1 C. & K. 24, at p. 31.

[31] Isaacs, *The Law relating to Theatres, Music Halls and Public Entertainments* (1927), p. 97.

[32] *Ashley* v. *Kenyon* (1793) 1 Esp. 48. Lord Kenyon said 'The injury complained of was too remote, and impossible to be connected with the cause assigned for it as her refusing to perform might have proceeded from groundless apprehension of what might never have happened, the plaintiff should not be at liberty to suggest the libel as the cause of that injury which might have proceeded from another cause, or perhaps from caprice or insolence'.

If the actors are the servants or agents of the management, then the latter will be liable for all negligent acts committed by them. If, however, the actors are independent contractors, different considerations arise. The leading case is *Cox* v. *Coulson*,[38] where a member of the audience was hit by a bullet from a pistol used by one of the actors in a company not under the control of the management, and thought to contain a blank cartridge only. It was held that by reason of the contract between himself and the injured party, the manager was under a duty not to give a performance which was inherently dangerous, and if there were dangerous acts in a play 'he must use reasonable care and diligence to see that such incidents are performed without risk to the playgoer'. He is not, however, under a liability for any accident which he could not have prevented by the exercise of reasonable care or supervision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill.[39]

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[33] (1870) L.R. 5 Q.B. 501.
[34] *Ibid.*, at p. 508.
[35] (1866) L.R. 1 C.P. 274.
[36] *Hayward* v. *Drury Lane Theatre* [1917] 2 K.B. 899.
[37] *Addie & Sons, Ltd.* v. *Dumbreck* [1929] A.C. 358, 365.
[38] [1916] 2 K.B. 177.

(d) *Entertainment Duty.* Entertainment duty is payable in accordance with the relevant Finance Acts, the present scales being laid down by the Acts of 1943 and 1949.[40] Exemptions are granted by the Finance Act, 1946,[41] which says that no duty will be payable when the Commissioners are satisfied that the entertainment is provided by a society, institution or committee which is not conducted or established for profit and of which the aims, objects and activities are partly educational.[42] To help them in their task the Arts Council,[43] set up in 1946, is made responsible for advising the Commission.

(3) CONTRACTS BETWEEN MANAGEMENT AND PERFORMERS

Theatrical contracts are governed by the usual legal principles,[44] though these are varied by the customs of the profession and by the special status of the actor.[45] Many customs have been accepted by the courts, provided that they are reasonable, certain, do not contradict the express terms of the contract, and are not contrary to the general law. It has been held that an 'engagement for a year' means that the actor is to receive salary during the theatrical season only, and not during the whole year.[46] Actors are to be billed on the notice boards according to their importance.[47] Where there is an engagement for an indefinite period, there is a custom that it may be terminated by two weeks' notice on either side.[48] Even though such customs exist, it is usual for them to be embodied in the express terms of the contract, to obviate any difficulty which may arise.

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[39] *Ibid.*, at p. 183.

[40] Finance Act, 1943; Finance Act, 1949, ss. 9–11.

[41] Finance Act, 1946, s. 8 (1).

[42] Thus, 'A Streetcar named Desire', 'Death of a Salesman', 'The Seagull' have recently been so exempted. See *The Times* newspaper, December 14, 1949, and *The Evening Standard* newspaper, November 11, 1949.

[43] See the Royal Charter granted on August 2, 1946.

[44] *Morgan* v. *Manser* [1947] 2 All E.R. 666 (frustration); *Loftus* v. *Roberts* (1902) 18 T.L.R. 532 (uncertainty); *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430 (infancy).

[45] *Fechter* v. *Montgomery* (1863) 33 Beav. 22, where Sir John Romilly says at p. 27 'Here the defendant carries on the profession of an actor, a profession peculiar in its character and results, for it is to be observed that his success entirely depends on pleasing the public and upon being constantly before the public. . . . It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person'.

Nowadays most theatrical engagements are governed by the Esher Standard Contracts. There are various types including the Contracts for Repertory, for Tour or Season, for Musical Plays in London, for Non-Stop Revue, for Pantomime and for Straight Plays in London. For the present purpose we will take the latter type only. It is to be noticed that these standard contracts have been approved by the London Theatre Council,[49] and are very widely used.

The reason why so few cases on the law of the theatre appear in the Law Reports is that one of the express terms of the Contract is that all disputes are to be settled by arbitration. Every engagement is from the date of the first rehearsal for the 'run of the Play' at such times and at such theatres in the West End of London and prior to the first performance there, at such theatre or theatres as the manager shall require. The run of the play may be extended from a West End theatre to any theatres within a radius of 15 miles from Charing Cross, but if the run is so extended, the manager shall give seven days' notice of the termination of the run of the play. The manager guarantees that he will produce the play on or before a certain date, or within fourteen days thereafter. Many detailed rules are included in the Schedule to the Contract. An artist receiving less than £10 per week is paid 10/- for each rehearsal which is deemed to be of eight hours' duration excluding a break for rest and refreshment, and during the period of rehearsal no artist shall receive less than £2 per week.

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[46] *Grant* v. *Maddox* (1846) 15 M. & W. 737.

[47] *Elen* v. *London Music Hall, Ltd.* (1906), *The Times* newspaper, May 31 and June 1. But see *infra*, p. 122.

[48] *George Edwardes (Daly's Theatre) Ltd.* v. *Comber* (1926) 42 T.L.R. 247; *Gubertini* v. *Waller* [1947] 1 All E.R. 746, 747, but see *infra*, p. 122.

[49] On the London Theatre Council there are ten members of each side from the Society of West End Theatre Managers and British Equity respectively. Lord Esher is Chairman of the Council.

If any rehearsal is extended beyond the hour of midnight, the manager must pay any reasonable expenses which the artist incurs in providing proper means of transport for his return home. The weekly salary of an artist during the run of the play shall never be less than £3 for eight performances. The artist agrees to give his exclusive services to the manager, and not to perform for the benefit of any other company or person without first getting the manager's written consent. Express powers of dismissal are provided, whereby if the artist is incapacitated from attending three different days' rehearsals through illness, mental infirmity or accident, the engagement may be terminated. During the run of the play, absence for similar reasons for twelve or more consecutive performances in the course of three weeks or for more than sixteen performances during a consecutive period of three calendar months may lead to the same result. Absence for any other reason is a ground for instant dismissal. All character and special costumes and wigs are found by the manager, as also are ladies' dresses, hats, shoes and gloves. Male artists are not treated so handsomely, for they must provide at least one ordinary walking suit and one evening suit, but if they earn more than £10 a week they may be called on to provide three such suits. If the manager decides not to produce, he must pay two weeks' salary and all remuneration to which the artist may be entitled for rehearsals. The artist must comply with the rules of any theatre at which the company may be rehearsing or performing, and with all the rules made by the manager, provided they are not in conflict with the terms of the agreement. The manager has the sole right to determine the inclusion and/or the position of the artist's name and the size and nature of the type on all bills, programmes and advertisements. No salary is payable when the theatre is closed by reason of royal demise, national mourning, war, fire, strikes or lockouts or for any cause beyond the control of the manager. The overriding clause says that the artist must appear at all performances, and perform the services required in a diligent and painstaking manner, and shall play the part as directed by the manager, and shall not insert or omit any words or business in the artist's part not approved by the manager.

If the management desires to employ young performers, certain regulations must be borne in mind. A local authority has power to grant a licence for a child who has attained the age of twelve years to be employed in a public entertainment, provided that proper provision has been made to secure his health and kind treatment.[50] The child must leave the theatre not later than fifteen minutes after the end of his part in the entertainment, and in no case later than 11 p.m. If living with his parent, the child must be accompanied home by some fit person. If the child does not attend a school in the area, the person in charge must keep records of the scheme of work done and the time devoted to such work, and these records must be produced to the local Education Authority, if required.[51]

No person under the age of 16 is allowed to take part in any public performance in which his life or limbs are endangered.[52] No person under the age of 12 can even be trained to take part in such performances, but if he is over 12 but under 16 a licence may be granted by a Petty Sessional Court, provided that seven days' notice is given to the chief officer of police for the district in which the person is to be trained.[53]

Every theatrical employer, which means 'any person who by himself or any agent, engages or employs at any one time three or more theatrical performers' must register with the registration authority in whose district he resides under the Theatrical Employers Registration Act, 1925.[54] The Act, however, does not apply to any person to whom a licence under the Theatres Act, 1843,[55] has been granted. The object of the Statute is to prevent persons of no substance from engaging companies and then abandoning them or failing to pay salaries. He must insert not more than six weeks nor less than twenty-one days before registering, in a London newspaper devoted to the interests of the stage profession in two different issues a notice that he intends to register.[56] On payment of a registration fee of 40/-

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[50] Children and Young Persons Act, 1933, s. 22.

[51] The Employment of Children in Entertainments Rules, 1933, S.R. & O. 1933, No. 971, as amended by S.R. & O. 1946, No. 1353.

[52] Children and Young Persons Act, 1933, s. 23; 'performance of a dangerous nature' includes all acrobatic performances and all performances as a contortionist; *ibid.*, s. 30.

[53] *Ibid.*, s. 24; see *Encyclopædia of Forms and Precedents* (3rd ed.), Vol. 7, p. 443.

[54] Theatrical Employers Registration Rules, 1925, S.R. & O. 1925, No. 1146.

[55] Section 7.

[56] Theatrical Employers Registration Act, 1925, s. 2.

the registration authority issues a certificate, makes the appropriate entry in the register and sends a copy to the Home Secretary.[57] A theatrical employer commits an offence if he abandons the theatrical performers during the course of a theatrical engagement, carries on his business without being registered or supplies false particulars to the registration authority.[58] He is deemed to have abandoned the performers if he absents himself from the place where the performers are in pursuance of the engagement, without paying or making arrangements for the payment of all wages and expenses which are due, unless he can prove that he was not absent with intent to avoid payment.[59] If he fraudulently makes default, a court of summary jurisdiction may order his certificate to be delivered up and his registration cancelled, or order that his certificate be suspended for such period as it may think fit.[60] The registration authority can institute and prosecute proceedings for any offence under the Act.[61] Any offence can be punished by a fine of £50 and/or three months' imprisonment.[62]

(4) DRAMATIC COPYRIGHT

The last topic that will be considered is the question of copyright. To enable protection to be given to a dramatic work under the Copyright Act, 1911,[63] certain general rules must be fulfilled. The primary condition is that the work should be 'original'. Copyright does not protect original ideas, but only the expression of ideas. Although the reproduction of a plot alone is not an infringement of copyright, the reproduction of incidents and dramatic situations or points in substantially the order and arrangement of the original will be restrained.[64] Protection may be given to an original treatment or independent labour applied to an old subject or common idea.[65]

It has been held that there can be no copyright in a title of a play. In one of the leading cases the plaintiff had written a play called 'Where there's a Will there's a Way', the word 'will' meaning testamentary disposition. The defendant had written a play called 'Where there's a Will', and in this case too the word 'will' was used in the same sense. The plaintiff alleged that her copyright had been infringed, but it was decided that she could not appropriate the words of a familiar proverb to herself by giving them a peculiar meaning.[66] On the other hand, titles of plays can be protected from imitation by means of a 'passing-off' action if the public is likely to be deceived into thinking that the works are the same.

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[57] *Ibid.*, ss. 3, 4.
[58] *Ibid.*, s. 5.
[59] *Ibid.*, s. 5 (2).
[60] *Ibid.*, s. 7.
[61] Theatrical Employers Registration (Amendment) Act, 1928, s. 1.
[62] Theatrical Employers Registration Act, 1925, s. 6 (1).
[63] For international copyright see *The Solicitor* (1950), Vol. 17, p. 15.
[64] Copinger, *Law of Copyright* (8th ed.), p. 144.
[65] *Corelli* v. *Gray* (1913) 30 T.L.R. 116.

There can of course be no copyright in a play which is libellous, immoral or calculated to defraud or deceive the public. Copyright protection is afforded to a dramatic work[67] provided that it is in some permanent form and fixed in writing. It has been held that no copyright exists in 'stage business' or 'scenic effects'[68] though these may naturally be evidence of an infringement of copyright.[69]

Copyright belongs to the author of the work, *i.e.*, one who originates the actual language in which the work is expressed. A person who merely suggests the plot of a play to the writer is not the author.[70] The term of copyright endures for the life of the author and a further period of fifty years. If the play is the work of joint authors, the period is for the life of the author who dies first and a further fifty years, or for the life of the survivor, whichever is the longer.[71] Copyright may be assigned, but the assignment must be made in writing by the owner of the copyright or by his duly authorised agent.[72]

Various remedies are open to a plaintiff who can prove an infringement of his copyright. He can apply for an injunction to restrain the defendant from continuing the infringement. Damages may be given, but not if the defendant proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright subsisted in the work.[73] Further, the court may order that the defendant render

[66] *Broemel* v. *Meyer* (1912) 29 T.L.R. 148.

[67] Copyright Act, 1911, s. 35.

[68] *Tate* v. *Fulbrook* [1908] 1 K.B. 821.

[69] *Ibid.*, at p. 832.

[70] *Donoghue* v. *Allied Newspapers, Ltd.* [1938] Ch. 106.

[71] Copyright Act, 1911, ss. 3, 16.

[72] *Ibid.*, s. 5 (2).

[73] *Ibid.*, s. 8.

to the plaintiff an account of all the profits made out of the infringement. Any one who knowingly and for his private profit causes any play to be performed without the consent of the owner of the copyright is guilty of an offence punishable on summary conviction by a fine not exceeding £50.[74]

I hope that what I have said will furnish you with food for thought during those minutes when you are waiting for the rising of the curtain, after which you will be able to forget the dry bones of the law in the enjoyment of the play.

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[74] *Ibid.*, s. 11 (2).

9

POSSESSION AND LARCENY

J. Ll. J. Edwards

When Moses received the Ten Commandments on Mount Sinai and wrote down for the Israelites on tables of stone 'Thou shalt not steal', he can hardly have envisaged the tangled web of fictions and technicalities surrounding the present-day law of larceny in this country. The law governing the subject of theft is one which is administered daily by magistrates as well as judges, and one would expect, certainly one would deem it desirable, that the rules by which the accused's guilt or innocence is determined should be susceptible of ready comprehension and easy exposition. Unfortunately nothing is further from the truth, and the purpose of this paper is to expose and condemn the sometimes superfluous distinctions and often irreconcilable applications of the doctrine of possession in the reported cases on larceny.

It is probably true to say that in no other branch of our criminal law has so much resort to fictions[1] been made as in the law of larceny. Jeremy Bentham was wont to pour ridicule on legal fictions wherever he came across them, but Sir Henry Maine, in his classic, *Ancient Law,* adopts a far more reasonable and realistic attitude when he says, 'At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law. . . . But at the same time it would be equally foolish to agree with those theorists who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order'.[2]

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[1] Maine defines a 'legal fiction' as meaning 'any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being 'modified'; *Ancient Law* (new edition published by John Murray), p. 32.

[2] *Loc. cit.*

Their continued existence, like barnacles attached to the principles governing the offence of larceny, makes a mockery of any contention that our law of theft is based on logic and common sense. That, to my way of thinking, is a most unsatisfactory state of affairs. By all means ensure that the provisions of our criminal law are water-tight and permit no loopholes for the criminally bent members of the community—but don't stretch the existing law of theft to cover cases which are not larceny as defined in the Larceny Act, 1916.[3]

According to section 1 of the Act:—

> 'A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof'.

This definition represents the culmination of the elaborate and intricate development of the old common law conception of theft as enunciated by the earliest writers, Glanville, Bracton, Britton, through the Year Books, and summarised by the later writers, Coke, Hale and East. So that when we come to examine the definition closely, it will often be necessary to refer to the works of some of these writers, side by side, of course, with the reported cases, in order to understand the principles underlying the law of larceny.

Theft is essentially a crime against possession, not ownership, this point being made clear by the Larceny Act, which states[4]:—

> 'the expression "owner" (in the definition of larceny) includes any part-owner or person having possession or control of, or a special property in, anything capable of being stolen'.

A brief explanation is therefore called for to show the relation between the law of larceny and the general theory of possession. It is important to recognise at once that the law does not provide the same protection, nor attribute the same liabilities, to persons who have mere physical possession (possession in fact) as opposed to legal possession (possession in law). Moreover, we shall see abundantly illustrated the truth of Sir John Salmond's words when he wrote[5] that the cases on larceny involve a multitude of fine distinctions and variant uses of the same terms. Accepting the historical reasons for many of the distinctions made in the law of larceny we are led, he says, to the conclusion that possession is a concept varying in its content according to the nature of the remedies in connection with which it is employed.

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[3] The preamble says it is 'An Act to consolidate and simplify the law relating to Larceny triable on indictment and kindred offences', but whether it achieved its ostensible purpose is questionable. The definition does not apply to certain cases of stealing triable only by a Court of Summary Jurisdiction. And see Stephen's *Digest of the Criminal Law* (8th ed.), Art. 361, p. 320.

[4] Section 1 (2) (iii).

As I have already indicated, there are two different grades of possession known to English law, physical and legal possession. More often than not the one person, generally the owner, has both physical and legal possession of a particular object, but that is not necessarily so. Where then is the dividing line? Physical possession has been defined in the leading authority on the topic,[6] as effective occupation or control, which merely poses the question, what constitutes effective control? The same learned authors say[7] that in common understanding that occupation is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment. A few examples will best enable us to understand how this works in practice. Clearly, in holding this book and in wearing your clothes you are exercising effective control. The fact that any one might come along and deprive you of this book or denude you of your clothes does not make your control any less effective for the purpose of establishing your physical possession of these objects. Physical ability to exclude others is not necessary, a point which is well illustrated by Mr. Justice Holmes, who wrote that a powerful ruffian may be within equal reach and sight when a child picks up a pocket-book, but if he does nothing the child has manifested the needful power as well as if it had been backed by a hundred policemen.

Moreover, the fact that a certain object is not within my sight or reach does not prevent me from having physical possession of it. Thus, the gardening tools stored away in the garage outside my house, the clothes in my wardrobe upstairs and the cutlery in the kitchen cupboard, all these are in my physical possession notwithstanding the fact that they might be taken away by a wrongdoer without my knowing anything about it.

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[5] *Jurisprudence* (9th ed.), p. 376.

[6] *Possession in the Common Law* by Sir Frederick Pollock and Mr. Justice Wright, p. 12.

[7] *Ibid.*, at p. 13.

So much for physical possession. Now let us turn to legal possession, possession-in-law. This is the degree of possession necessary for the prosecution to show in a charge of larceny. This is the degree of possession to which alone the law affords protection, in the sense that it recognises the right of a legal possessor to prevent his being dispossessed, and will punish the wrongdoer. As one learned writer has indicated,[8] physical possession is a fact, a physical relation to a thing; whilst legal possession is a right, recognised and protected by law. When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, then you have legal possession, possession-in-law.[9]

Two points require noticing here. First, legal possession may arise even though physical possession was obtained unlawfully. It is as much legal possession as that which is acquired lawfully, and with the exception of the true owner's rights, protected by the sanctions of English criminal law. Thus, for example, A, a thief, breaks into my house and steals a considerable quantity of antique silver. Although his acquiring possession is unlawful, his intention of excluding the world at large on his own account makes his possession legal. If, on his way home, rough justice overtakes him in the form of another thief, B, who assaults and robs him of the silver, A can nevertheless maintain a successful prosecution for larceny against B. Of course, I, as the true owner, can prosecute both A and B for larceny.[10]

Secondly, as already indicated, legal possession and physical possession do not necessarily go hand in hand. This exceptional position is generally illustrated by the case of a servant who is given control of his employer's goods. Take, for example, the baker's roundsman, the coalman, the dustman, the ship's captain, the air-liner's captain—however near or far their excursions from their employer's place of business may be—the intent to exercise sole and exclusive dominion over the van, the lorry, ship or air-liner is attributed to the employer, in whom, therefore, legal possession continues. The servant is said to have custody or detention only. But, for some unaccountable reason, this rule does not operate where a servant receives a thing from the possession of a third person to hold for his employer. In that case the servant is looked upon as having full legal possession until, by some act, he appropriates the thing to his employer's use. We shall see later the absurd situations which this distinction can create.

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[8] Keeton, *Jurisprudence* (2nd ed.), p. 181.

[9] Pollock and Wright, *Possession in the Common Law*, pp. 16, 17.

[10] See 2 East, *Pleas of the Crown*, p. 654, and 1 Hale 507.

With that bird's-eye view of the accepted meaning in law of the term possession, let us turn now to examine the various instances in which English criminal law, and in particular the judiciary, has meandered and vacillated in its application of the doctrine of possession to the law of larceny. In doing so, one may perhaps be forgiven for adapting the words of that famous historian Edward Gibbon who said, 'few men without the spur of necessity have resolution to force their way through the thorns and thickets of that gloomy labyrinth',[11] but it is the very spur of questioning the necessity for the arbitrary and unreal[12] application of the principles of possession which fortifies me in taking us along this 'gloomy labyrinth'.

The first question for our consideration is this: to maintain an indictment for larceny is it necessary to name the person in whom possession existed at the time of the alleged larceny? Sometimes this is expressed in the form: must the name of the owner of the article be given? This latter mode of posing the question is too narrow in so much as it fails to take cognisance of the paragraph in section 1 of the Larceny Act which, you will recall, interprets the word 'owner', to include any 'person having possession or control of, or a special property in' the article in question.

The present Lord Chief Justice's answer to the question was given in the recent case of *Hibbert* v. *McKiernan* when he said, 'At the present day allegations concerning the ownership of stolen property are, except in a few exceptional cases, treated as immaterial'.[13] Humphries, J., in the same case, expressed no inhibitions at all, declaring, 'it is not essential to name any person as the owner of the goods in an indictment for larceny though it is the practice to do so',[14] and quoted as his authority Rule 6 (1) of the rules contained in Schedule 1 to the Indictments Act, 1915.[15] An examination of this rule reveals that the actual words used are that it shall not be necessary to name the person to whom the property *belongs*. The use of the word 'belongs' is an unhappy one, and it is at least open to argument that it is intended to refer to ownership in the strict sense of that term[16] and not in the more liberal interpretation of that word in the Larceny Act of the following year, where the emphasis is rightly placed on possession.

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[11] Speaking generally as to the study of the law, in his classic *Decline and Fall of the Roman Empire.*

[12] Stephen's *Digest of the Criminal Law* (8th ed.), Art. 359.

[13] [1948] 1 All E.R. 860, at p. 862.

[14] *Ibid.,* at p. 863.

Be that as it may, an examination of the old authorities reveals the importance of establishing possession in the prosecutor, failure to do which was an absolute bar to conviction. Thus, in *R.* v. *Rowe*[17] a case heard by the Court for Crown Cases Reserved in 1859, the prisoner was charged with stealing iron from the bed of a canal belonging to a company in whom the property was laid. The iron had fallen or been thrown overboard from barges and had been taken by the prisoner when the canal was drained. The vital question before the court was whether the Canal Company had sufficient possession of the iron to maintain an indictment for larceny, the answer given being in the affirmative. However, as Sir Fitzjames Stephen points out,[18] the possession of the Company, having regard to the complete absence of any knowledge of the iron's existence, can hardly be said to be 'actual' possession; implying, I suggest, that the court's decision was prompted mainly by the necessity for satisfying the rule as to showing possession in the prosecutor.

The next question is this: can an owner be prosecuted for stealing his own goods? Astounding though it may seem to the layman, the answer is yes, but the exact limits of this exceptional situation are by no means certain. That it is possible is due to the fact that the Larceny Act extends a far wider interpretation to the term 'owner' than in common speech. It includes, as we have seen, a person who has possession or control of, or special property in the article in question. Such a person is the bailee for value, examples of which spring readily to one's mind—the hire-purchaser, who only has possession until he has paid all the instalments; the pawnbroker; the person who takes out a book from the library round the corner at 2d. a week; the warehouseman who has charge of bonded tea-chests or whisky. In each case, during the continuance of the bailment it is the bailee for value, not the true owner, who has legal possession. If, therefore, the true owner without the bailee's consent and without a claim of right purports to exercise complete dominion over that which, so long as the bailment exists, the bailee alone is entitled to exercise dominion, it seems reasonably clear that the general owner has fulfilled all the conditions of larceny.

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[15] R. 6 (1) reading as follows: 'The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described *it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) *to name the person to whom the property belongs*'.

[16] A view which is fortified by the specimen form of indictment for larceny (Form No. 9) printed in the Appendix to the same statute, which contains the name of the owner of the property.

[17] (1859) Bell C.C. 93; 32 L.T. 339.

[18] *Digest of the Criminal Law*, pp. 325, 512 *et seq.*

That this represents the present state of the law in relation to bailments for value seems generally agreed. At any rate, several cases in the early part of the nineteenth century recognised this possibility. The difficulty was to discover the *animus furandi,* generally regarded as an intent to deprive the owner permanently, which is required in ordinary cases. The length to which the courts were prepared to go, in artificially interpreting the criminal intent of the accused owner, may be seen in the fact that it varied from an intent to charge the bailee in detinue[19] to an intent to render the bailee liable to pay customs-duty, otherwise payable by the bailor,[20] to a more general alternative intention of damage to the bailee or gain to the accused.[21] Professor Kenny states the *animus furandi* to be a general intention of defrauding the bailee.[22]

But can an owner be prosecuted for stealing goods from his own servant who, as we have seen, *vis-à-vis* his employer, has only got custody of the goods? East, in his Pleas of the Crown, puts forward an illustration[23] which, with slight modernisation, might well happen any day in the streets of London. An employer sends his servant on a journey with a quantity of money, afterwards waylaying and robbing him, in order, adopting a more up-to-date frame of mind, to claim on an insurance policy against theft and robbery. East is in no doubt that the employer is guilty of larceny on the ground that though, in general, the servant has no property as against his master, yet in such a case he has a special property as having a clear right to defend his possession against the master's unlawful demand. This view is criticised by Pollock and Wright who rightly point out[24] that if this doctrine is correct it must follow that, in such a case, the servant has legal possession as against his employer, a theory in direct contradiction to the accepted view that a servant, at any rate in relation to his master, only has custody or detention.

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[19] 1 Hale 513.

[20] *R.* v. *Wilkinson* (1821) R. & R. 470.

[21] *R.* v. *Bromley* (1822) R. & R. 478.

[22] *Outlines of Criminal Law* (15th ed.), p. 224.

[23] At pp. 558 and 654.

This is by no means the only occasion where the position of a servant in relation to the law of larceny causes difficulties of assimilation. To take the most glaring example first, what more subtle distinction could be thought of than that which exists between larceny and embezzlement, a distinction condemned by Stephen, J., as perfectly useless and one which Parliament, in its unsuccessful attempts at the close of the last century to enact a criminal code, would have abolished. As the law stands, however, the position is this.

If a servant is entrusted by his employer with the care of goods, either in the everyday performance of his job (*e.g.*, the roundsman who uses his employer's van on his deliveries or the carpenter who uses his master's tools) or for a particular occasion only (*e.g.*, where a farmer entrusts a farm-hand to drive his cattle to the market) and the servant wrongfully disposes of the same, that is larceny. But reverse the circumstances, where the servant is given something by some third person for his employer (a typical illustration occurring whenever you purchase an article in a shop and hand over the money to the shop assistant or cashier) and instead, wrongfully disposes of it, that is not larceny. Indeed, until 1799 it was not a criminal offence,[25] but a statute passed in that year[26] rectified the omission by creating the felony now known as embezzlement.[27]

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[24] *Possession in the Common Law*, p. 139.

[25] Stephen in his *History of the Criminal Law*, Vol. 3, at p. 152 suggests that the reason for this gap in the criminal law was the excessive severity with which a mere debtor could be treated. In the case of a servant, his master could arrest him on mesne process and having got judgment, imprison him for an indefinite time or till payment.

[26] 39 Geo. 3, c. 85.

[27] 6 & 7 Geo. 5, c. 50, s. 17.

The reason underlying the distinction between the two offences is, of course, that in the first set of circumstances the servant is said to have only charge or custody of the goods, legal possession remaining in the employer, whereas in the latter situation the servant is deemed to acquire legal possession of the goods from the moment they are handed over to him by the third person. One cannot help asking, is there any real justification for this distinction? What is quite certain is the absurd position which sometimes results from a rigid application of this 'singular doctrine',[28] as will be seen from the following not uncommon example. An employer sends his servant with a lorry to fetch coal. The servant duly carries out his order, puts the load of coal into the lorry and sets off on the return journey. On his way home he wrongfully sells some of the coal and keeps the money. In a decided case,[29] where the facts were identical with those outlined above, the servant was convicted of larceny of the coal, and appealed. It was held by the Court for Crown Cases Reserved that the conviction was right, their process of reasoning being such that the late W. S. Gilbert could not possibly have failed to use it as the object of innocent but justifiable ridicule. They said:—

(i) throughout the servant's mission he only had custody of the lorry, which, together with its contents, remained in the employer's possession.

(ii) true, the servant had possession of the coal while he was carrying it from the coal merchant to the lorry, but once deposited in the lorry the servant's control changed its hue once more and reverted to custody.

(iii) if, therefore, the servant had sold the coal before putting it into the lorry, he would have committed embezzlement.

(iv) as it was, he sold the coal after putting it into the lorry, and that is larceny.

Must our criminal law, in order to safeguard a man's property, stoop to such needless refinements, such unnecessary technicalities? To provide, as the Larceny Act does,[30] that if upon a trial for embezzlement the accused appears in fact to have committed larceny, or vice versa, he can nevertheless be convicted of the alternative offence, is, I suggest, no real solution of the difficulty. The Gordian knot must be cut and the definition of theft extended in sufficiently wide terms to cover both situations.

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[28] *Digest of the Criminal Law*, p. 512 *et seq.*

[29] *R.* v. *Reed* (1854) D. & P. 256.

[30] Section 44 (2).

That is by no means the whole story so far as the triangle of servant, possession and the Larceny Act are concerned. Yet another apparent inconsistency must be noticed. We have seen that one of the established rules is that a servant entrusted with goods by his master does not have legal possession. Taking that rule one step further, and preserving a consistent attitude, one would have thought it safe to say that if such goods are stolen by some third person whilst in the custody of the servant, the taking is out of the possession of the master, not of the servant, and that the indictment should be drawn up accordingly. The fact that the charge is one of robbery, not simple larceny, makes no difference so far as the necessity for showing that the victim had possession of the goods at the time of the robbery.[31] As East said, 'A taking from the servant of the money or goods of his master in his presence, by putting in fear, is a taking from the master, and the offender may be indicted of robbing him'.[0]

However, nothing daunted, in 1929 the Court of Criminal Appeal in *R.* v. *Harding*[32] came to the surprising—may it not be erroneous—conclusion that, for the purpose of sustaining an indictment for robbery (and, therefore, it must follow, larceny) it was correct to allege that the prisoners robbed a maid-servant as she had a sufficient possession.[33] The facts, which are important, were that the appellant and another broke into a dwelling-house, attacked the maid-servant by striking her on the head with a rolling-pin and demanded money and clothes. She duly handed over her employer's mackintosh who, at that moment, was just outside in the garden.

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[31] See Archbold (31st ed.), p. 513. Robbery consists in the felonious and forcible taking from the person of another, or in his presence against his will, of any money or goods to any value, by violence, or putting him in fear. 4 Bl.Comm. 243; 1 Hawk C. 34.

[0] 2 Pl. of Cr. 654. See too 2 Hawk. c. 23, s. 44.

[32] (1929) 46 T.L.R. 105; 21 Cr.App.R. 166.

[33] The phrase used by the Lord Chief Justice in *Harding* was that the maid-servant had a 'special property in' the mackintosh, a phrase used in the interpretation of the term 'owner', see section 1 (2) (iii) of Larceny Act, 1916. Whether it has a separate meaning distinct from 'possession or control of', has, to the best of my knowledge, never been explained, and it is suggested that, as is so often the case with statutory terminology, in the particular context all three terms are synonymous.

Now, if the maid-servant had of her own free will wrongfully disposed of the mackintosh to an intruder, the court would undoubtedly have said she was guilty of larceny, possession being laid in her employer. But where, as in *Harding*, it had been forcibly taken from her, the court, without so much as a word of explanation, held that for the purpose of prosecuting the intruder, the maid had sufficient possession of the mackintosh. The only authority cited was a case in 1800, *R.* v. *Deakin & Smith*,[34] where goods were being conveyed by stage coach from London to Spalding and the coach was held up by highwaymen, who seized the goods from the boot of the coach. In an indictment charging the accused highwaymen with larceny, the driver of the coach was held to have possession of goods deposited in the coach on the special ground that 'they are entrusted to his custody and disposal during the journey, and the inconvenience would be great indeed if the law were otherwise. The difficulties and mistakes which must unavoidably arise in hunting after all the persons who may be concerned as proprietors of a stage coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable'.

But surely there is the world of difference between the facts in *Deakin* and those in *Harding*, where the maid-servant is only temporarily left alone in the house, her employer being near at hand in the garden. Counsel for the Crown in *Deakin* acknowledged the principle that a servant living in his master's house did not have possession,[35] but argued, rightly or wrongly, that the case of a coachman or other servant not under his master's control is different.[36] Mr. Justice Wright entertains no doubt that the principle underlying the decision in *Deakin* is an isolated one, when he writes, 'the decision of the judges seems to have been based on the argument *ab inconvenienti* in the particular case, the servant being a coach-driver, and the employers a numerous partnership, and it being in those times necessary to join all persons sharing in the property laid, and the judgment appears to be expressly limited to the case of the coach-driver'.[37] Pursuing the same line of argument, the learned editor of the *Law Quarterly Review* neatly summarises the criticism levelled against the Court of Criminal Appeal's ruling in *R.* v. *Harding* by saying that if the maid had possession of the mackintosh it is difficult to think of any case in which a servant can be said to have only custody, for the mackintosh cannot be said to have been specially entrusted to her except for the general duty which all servants have to protect their master's property and, moreover, the master was within call.[38]

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[34] There are two reports of this case: 2 East Pl. of the Cr., p. 653, a 15 line summary, which was cited in *R.* v. *Harding*, and 2 Leach 862, containing the full report of the arguments and judgment in the Court of Exchequer Chamber, occupying 14 pages, which was apparently overlooked by the Court.

[35] 2 Leach, p. 868. See too Y.B. 21 Hy. 7, Hil. pl. 21 translated by Kenny, *Select Cases*, 216; and Coke, *Third Instit.* 105, 108 who wrote '. . . my butler or cook that in my home hath charge of my vessel or plate hath no possession of them, as the bailee shall . . .'. Also Holdsworth, *History of English Law*, Vol. 3, pp. 364–365.

[36] See *Possession in the Common Law*, pp. 138–139; *Hopkinson* v. *Gibson* (1805) 2 Smith 202.

Time does not permit more than a passing reference to the next brace of anachronisms which, by today, are firmly established in the law of larceny. Both arise out of the fundamental rule that if the original taking possession is lawful, a subsequent intent to deprive the owner does not constitute larceny.[39] The reasoning is simple, for if a thing is already lawfully in someone's possession, he obviously cannot be guilty of taking it *animo furandi* out of someone else's possession.

So, in the case of husband and wife, before 1882 it was impossible for either to steal the other's goods owing to the naïve doctrine that spouses are one in law and that possession by one is equally possession by the other.[40] That convenient rule, so far as absconding adulterous spouses were concerned, disappeared with the passing of the Married Women's Property Act.[41] Today, the position, not very widely known, is that husband and wife can be prosecuted for stealing each other's property provided they are living apart or the goods are taken with a view to their living apart.[42] Consequently the wife who takes all her husband's worldly goods to her paramour, but with no intention of leaving her husband is, under the old common law rule which applies in such circumstances, immune from liability under our criminal law.[43]

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[37] *Possession in the Common Law,* p. 139.

[38] 46 *Law Quarterly Review,* p. 135.

[39] Stephen's *History of Criminal Law,* Vol. 3, pp. 144, 145, 151.

[40] *R.* v. *Harrison* (1756), 1 Leach 47; Holdsworth, *History of English Law,* Vol. 3, p. 361.

[41] 45 & 46 Vict., c. 75.

[42] Larceny Act, 1916, s. 36.

Another departure from the fundamental rule that a change of possession is essential to theft are the cases of larceny by bailees, expressly provided for in section 1 of the Larceny Act, 1916, which says[44]:—

> 'a person may be guilty of stealing . . . notwithstanding that he has lawful possession thereof if, being a bailee . . . he fraudulently converts the same to his own use or the use of any person other than the owner'.

When one considers the historical background for this deviation from the common law rule one is left wondering at the hotchpotch hidden beneath the surface of the Larceny Act. The story begins with the famous *Carrier's Case*[45] in 1474, where a carrier was entrusted by a merchant with the carriage of bales of goods to Southampton. Instead he broke open the bales and appropriated the contents. Under the common law rule the carrier had legal possession and therefore could not commit larceny. However, by a thoroughly disreputable fiction, instigated on dubious grounds,[46] it was held that by 'breaking bulk', *i.e.*, by opening the bales, the carrier had not only determined his lawful possession, but also fulfilled the condition of 'taking' out of the possession of the bailor. On the same reasoning, theft of the whole thing bailed must also determine the bailment, but not until nearly three centuries later did appropriation of the complete article bailed become recognised as larceny.[47] Now it stands as an accepted deviation from the general rule,[48] justifiable on grounds of expediency perhaps, but certainly not of consistency.

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[43] *R.* v. *Creamer* [1919] 1 K.B. 564.

[44] Proviso to section (1) (i).

[45] (1474) 13 Edw. 4, p. 9, No. 5 debated both in the Star Chamber and Exchequer Chamber.

[46] See Stephen, *History of Criminal Law,* Vol. 3, pp. 139–140, who thinks it obvious from the report that the decision was a compromise intended to propitiate the Chancellor, and perhaps the King.

[47] 20 & 21 Vict., c. 54, s. 17 now embodied in Larceny Act, 1916, s. 1 (i) (*supra*).

[48] *R.* v. *Hassall* (1861) L. & C. 58 has restricted the proviso in section 1 Larceny Act to cases where the bailee is under a duty to return the identical article bailed to the bailor, or to deliver it to some third person. Otherwise the offence is fraudulent conversion (section 20 (1) (iv)), not larceny.

From there let us move on to consider the equally artificial[49] doctrine of continuous trespass which, conceived as long ago as the fifteenth century[50] acquired prominence in 1853 in the famous case of *R.* v. *Riley*,[51] which was followed earlier this year by the Divisional Court in *Ruse* v. *Read*.[52] In *Riley's Case* the facts are quite simple—they show that the prisoner had a flock of twenty-nine black-faced lambs which, with the consent of a farmer, he put into the latter's field for a night's keep. Already in the same field were ten white-faced lambs, the property of another person, the prosecutor in the case. Early the next morning, which, according to the evidence, was thick and rainy, Riley drove away his twenty-nine lambs together with one white-faced lamb. It was quite clear, and the jury in fact so found,[53] that at the time of leaving the field, the prisoner did not know that the prosecutor's white-faced lamb had become mixed up with his flock of twenty-nine. Later the same day Riley agreed to sell his flock of sheep to another farmer who, on counting them, informed the accused that there were thirty instead of twenty-nine, at the same time pointing out the white-faced lamb. The prisoner replied, 'If you object to take thirty, I will withdraw one'. The farmer, however, bought the whole of the flock.

It is quite clear, I think, that at the time of selling Riley was fully aware that he was disposing of one lamb which was not his, and which he was not entitled to sell. He was duly indicted for stealing the white-faced lamb and convicted, the verdict of the jury being[54] that he was guilty of larceny at the time the presence of the prosecutor's lamb was pointed out to him.

The Court for Crown Cases Reserved unanimously affirmed the conviction; the basis for their decision being contained in the following passage from Pollock, C.B.'s, judgment[55]:—

> 'In the case now before the court, the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass . . .

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[49] *Possession in the Common Law,* p. 114.

[50] Pollock-Holmes, *Letters,* Vol. 1, p. 69.

[51] (1853) Dears C.C. 149; 20 L.T.O.S. 228, a decision of the Court for Crown Cases Reserved. See, generally, for a criticism of this case, J. W. C. Turner in *Modern Approach to Criminal Law,* pp. 374–389.

[52] [1949] 1 All E.R. 398, Coram Lord Goddard, C.J., Humphreys and Finnemore, JJ.

[53] Dears C.C. 151.

[54] *Loc. cit.*

[55] *Loc. cit.*

> if the original possession be rightful, subsequent misappropriation does not make it larceny,[56] but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animo furandi,* it is larceny'.

The Divisional Court in *Ruse* v. *Read* endeavoured[57] to justify the decision in *Riley's Case* on one of two alternative but totally contradictory grounds, *viz.*:—

(1) by invoking the doctrine of continuous trespass, involving of necessity, the conclusion that the accused took possession, wrongfully it is true, of the lamb when he left the field.

(2) alternatively the accused did not take possession of the white-faced lamb until he discovered its presence later and, forming an intent to appropriate it at that moment, there was a taking *animo furandi,* and therefore larceny.

With the second of these two interesting theories, involving as it does the vital question whether knowledge is essential to possession, I will deal later. Regarding the first, it is obvious, is it not, that the doctrine of continuous trespass is dependent on the initial taking possession being wrongful. Can it really be the law that where I am one of a Saturday afternoon's shopping throng, pushing my way through a large store, and an article displayed on the counter falls accidentally into my coat-pocket, shopping-bag or trouser turn-up without my knowing anything about its presence until later, that such a 'taking' is a trespass? Such circumstances, I suggest, are perfectly analogous to the facts in *Riley.* Am I precluded from pleading that such a taking was caused by an inevitable accident, and therefore not trespassory?[58] The two leading textbooks on the law of tort[59] acknowledge the existence of this defence to an action for trespass. So too does Atkin, L.J. (as he then was), in *Manton* v. *Brocklebank*,[60] and further support is forthcoming in *Hale's Pleas of the Crown* where it is stated :—

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[56] The statutory exception to this rule, viz., larceny by a bailee, was referred to by Humphreys, J., delivering the judgment of the Divisional Court in *Ruse* v. *Read* at p. 401.

[57] As indeed did Pollock, C.B. in *R.* v. *Riley* itself (*ibid.,* at p. 158).

[58] In considering this question it is worth remembering the words of Coleridge, C.J., in *R.* v. *Ashwell* (1885) 16 Q.B.D. 190, at p. 224 when he said 'All acts to carry legal consequences must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn'. The learned Chief Justice can scarcely be said to have had the case of *Riley* present in his mind when delivering the above extract from his judgment.

[59] Salmond (10th ed.), p. 318; Winfield (3rd ed.), p. 44. See too *Possession in the Common Law,* at p. 109.

'A taking of another's property may also be by mistake arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A stray from his flock to the flock of B and B drive them along with his own flock, and by his mistake, without knowing or taking heed of the difference, shears them, it is not larceny'.[61]

Humphreys, J., in *Ruse* v. *Read* quotes, in support of the doctrine of continuous trespass, another example from the same work,[62] of a servant who takes his master's horse without permission and, in the course of his joy-riding, sells it as his own. This, said Hale, is declarative of his first taking being felonious and *animo furandi*. The illustration contains no evidence that the taking was by mistake (as in *Riley*) neither does it exemplify the doctrine of continuous trespass, instead it stresses the fact that what is now regarded as a rule of substantive law was originally only a rule of evidence, the original intent being presumed conclusively from the subsequent conduct.[63]

It is my respectful submission that *Riley's* taking of the white-faced lamb was not an actionable trespass and therefore the subsequent *animus furandi*—admittedly clearly established—could not operate to make the prisoner guilty of larceny. So much for the first of the two grounds upon which the court based its decision. Upon the alternative ground that Riley did not take possession of the lamb until he discovered its presence, there is a wealth of authority, deprived of much of its force by the lack of consistency shown by the courts.

The Larceny Act, despite the decision in *R.* v. *Riley,* solemnly declares the necessity for the intention to deprive the owner existing 'at the time of taking'.[64] How to overcome the rigid application of this rule in circumstances where a person acquires possession unknowingly, or by mistake, and not until his subsequent discovery decides to appropriate the thing to his own

[60] [1923] 2 K.B. 212, at p. 229.
[61] Vol. 1, at p. 506.
[62] *Ibid.,* at p. 509 ; see too pp. 506, 507.
[63] See the Pollock-Holmes *Letters,* Vol. 1, p. 455.
[64] Section 1 (1).

use?—that is the problem which the courts have faced in a series of decisions beginning in 1802[65] and culminating in the recent cases of *R.* v. *Hudson*[66] and *Ruse* v. *Read.* Viewing these authorities dispassionately one can well agree with the present Lord Chief Justice who appreciates that the task of the academic writer is one of 'attempting to reconcile the irreconcilable'.[67]

In a sentence, the question which has puzzled generations of judges is this—can a person be said to have legal possession of an article, of whose existence he is unaware? Take first the case of *R.* v. *Rowe,*[68] in which you will remember the accused was convicted of stealing iron from the bed of a canal. Despite the Canal Company's complete lack of knowledge of the iron's existence it was held, for the purpose of sustaining the indictment for larceny, to be in the Company's legal possession. Now let us look at the recent decision in *R.* v. *Hudson.* In that case the accused received a letter addressed to a Mr. Hudson. He kept the letter for some days without opening it—when he did so he discovered inside a cheque drawn by the Ministry of Food in favour of plain Mr. Hudson, without any initials.[69] In fact, the cheque was intended for a Mr. Lewis Hudson in payment for livestock bought by the Ministry. The prisoner wrote to the Ministry of Food saying he had received the cheque, but as there were no initials on it, he was sending it back, pointing out that his name was Mr. J. Hudson. Suspecting nothing, the appropriate official entered the initial 'J' in the payee's name, initialled the alteration, and returned it to the accused who very gratefully paid the cheque into his bank account. The prisoner was convicted of larceny and appealed to the Court of Criminal Appeal.

To be guilty of larceny the accused must have formed the intention to appropriate the cheque at the moment of 'taking' it, at the moment the cheque came into his possession. When did the 'taking' occur? Was it when he received the envelope, at which time there was no *animus furandi,* and therefore no larceny? Or was it when he opened the envelope and discovered the cheque, at which time, realising as he must have done that the cheque was intended for someone else, he decided to appropriate it, which is clearly a case of larceny? To maintain the first alternative, one must accept the principle that to establish possession knowledge of the thing's existence is not essential. In *Rowe's Case* the principle seems to have been accepted. In *Hudson's Case* it was utterly rejected. Which decision is right, or can it be that both cases are right?

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[65] The earliest of this string of cases is a civil action *Cartwright* v. *Green* (1802) 8 Ves.Jun. 406.

[66] [1943] 1 All E.R. 642, C.C.A.

[67] [1948] 1 All E.R., at p. 861.

[68] (1859) Bell C.C. 93.

[69] This fact seems to have escaped the attention of Humphreys, J., in his judgment in *Ruse* v. *Read* when, referring to *Hudson's Case,* he says that the accused on opening the envelope found inside a cheque drawn to J. Hudson. The point is not without importance as it is possible to argue that the prisoner did not form any *animus furandi* on first discovering the cheque—a theory borne out perhaps by his letter to the Ministry (*ibid.*, p. 643)—but on the return of the cheque from the Ministry. If this were in fact so, the original 'taking', whether on receipt of the letter or discovery of the cheque for the first time, was innocent; to constitute larceny, the second 'taking' would have to form the basis of the indictment.

It may, of couse, be said that the line of decisions, of which I have quoted *R.* v. *Rowe* as a typical example, are confined to circumstances where the article in question is, at the moment of taking, attached to or embedded in the land of the would-be possessor. One has only to cite such well-known cases as *Elwes* v. *Brigg Gas Co.,*[70] *South Staffordshire Water Co.* v. *Sharman*[71] and the recent case of *Hibbert* v. *McKiernan*[72] to see the importance of this qualification.[73]

There is, I suggest, another occasion when knowledge is not essential to establishing possession. Take the facts in *Riley's Case,* where it was suggested by the court that the prisoner did not take possession of the stray lamb until he discovered its presence. Can it be doubted, however, that if a third person had taken the lamb from out of the midst of Riley's flock, that Riley could, if necessary, have prosecuted the wrongdoer for larceny, or maintained an action for trespass against him in tort?[74]

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[70] (1886) 33 Ch.D. 562 (where a prehistoric boat was discovered in the process of excavations).

[71] (1896) 2 Q.B. 44 (where two gold rings were found at the bottom of a pool which was being cleaned).

[72] [1948] 1 All E.R. 860 Div. Ct. (where the subject-matter of the larceny were golf balls 'abandoned' by their owners on the golf links).

[73] I do not propose to enter into the controversy as to the merits of the cases I have cited in comparison with *Bridges* v. *Hawkesworth* (1851) 21 L.J.Q.B. 75 and *Hannah* v. *Peel* [1945] K.B. 509. This evergreen topic is fully dealt with in Goodhart's *Essays in Jurisprudence,* pp. 75–91; Salmond, *Jurisprudence* (10th ed.), p. 292, and in the lecture given by my colleague, Dr. O. R. Marshall, published in *Current Legal Problems* (1949), Vol. 2, pp. 68–86.

[74] The latter possibility was mentioned by counsel for Riley in answer to the question 'What do you mean by the term possession?' put to him by

If that is the case it is difficult to reconcile the totally different attitude adopted when the question of knowledge and possession arises in connection with the rule that the taking and the intent to steal must be contemporaneous. One may well ask, is it pure coincidence that the attitude of the courts has varied according to whether the guilt of the accused or the title of the prosecutor is the crucial point at stake?

To revert to the decision in *R.* v. *Hudson,* the Court of Criminal Appeal had before them nearly all the old authorities but, in a judgment occupying a mere couple of pages in the law reports, it can scarcely be said that the matter was gone into thoroughly. The authorities divide themselves easily into the 'letter' cases, the 'bureau' cases and the 'coin' cases, and it is in this order that I propose to deal with them.

In each of the 'letter cases' the prisoner was charged with larceny of the contents of a letter not intended for him. In *R.* v. *Mucklow,*[75] a case of 1827, it was held at a meeting of the judges that the conviction for larceny was wrong because it did not appear that the prisoner had any *animus furandi* when he first received the letter. In 1856, in *R.* v. *Davies,*[76] the jury were given a contrary direction to the effect that the prisoner had not received the post office order until he had discovered by opening and reading the letter, that it did not belong to him. But this direction was reversed by the Court for Crown Cases Reserved who upheld the interpretation of the law given in *Mucklow.* In 1900, the common serjeant in *R.* v. *Fish*[77] followed the two earlier cases holding that, in similar circumstances, there was no case to go to the jury. It is with some surprise, therefore, that we read of Charles, J., in *R.* v. *Hudson,* dismissing *Mucklow* and *Davies* with the comment 'Those are old cases', particularly as the decision in *R.* v. *Davies* was that of the Court for Crown Cases Reserved whose decisions, though not perhaps binding on its successor, are not to be so cursorily overruled.

Having so unceremoniously cast aside these criminal decisions —on facts identical with those in *R.* v. *Hudson*—the court cited

Pollock, C.B. in the second hearing before the Court for Crown Cases Reserved. The learned Baron did not demur to counsel's interpretation of the law.

[75] (1827) 1 Mood C.C. 160, cited with approval in *R.* v. *Vincent* (1852) 21 L.J. M.C. 109.

[76] (1856) Dears C.C. 640.

[77] (1900) 64 J.P. 137, not referred to in *R.* v. *Hudson.*

with approval two cases, commonly referred to as the 'bureau' cases, in which the question of larceny was only a subsidiary issue to a civil dispute. Whereas in the 'letter' cases it was held that the taking possession of an envelope also resulted in the immediate taking of its contents, in the 'bureau' cases it was held that the taking possession of a bureau does not necessarily transfer possession of the contents of a secret drawer.

Thus, in *Cartwright* v. *Green*[78] a bureau was delivered to a carpenter for the sole purpose of repair. He broke open a part of the bureau which it is was not necessary to touch in the course of executing repairs. Lord Chancellor Eldon held that, in doing so he was committing a trespass and, having an intention to take and appropriate anything he should find, that was a felonious taking.[79] In *Merry* v. *Green,*[80] on the other hand, a bureau was bought at an auction sale, the presence of the secret drawer not being discovered by the buyer until later. In that particular case there was a dispute as to whether the bureau had been expressly bought with or without its contents. Parke, B., preferred the latter version of the facts, and on those premises I am prepared to agree that neither the ownership nor possession of the unknown contents passes to the buyer. But, relying on my own experience of auction sales, it seems to be the exception rather than the rule that anything is said about the contents of a bureau, sideboard or any other piece of furniture offered for sale. Certainly, if I were the purchaser of any such article about the contents of which nothing was said, I would assume that on completion of the contract of sale both the property and possession of the article and its contents (if any) had passed to me. In the unhappy event of my being charged with larceny of the contents, I would in any case plead a bona fide claim of right—a contingency envisaged by Baron Parke in *Merry* v. *Green.*[81]

The main plank upon which the court based their decision in *R.* v. *Hudson* was the highly controversial 'coin' case of *R.* v. *Ashwell*[82] decided in 1885. Ashwell was convicted of larceny on the following facts—having asked the prosecutor for the loan of a shilling he was instead given a sovereign, both parties at the time believing a shilling to have been transferred. Sometime afterwards Ashwell discovered that the coin was a sovereign and then and there fraudulently appropriated it. The facts are simple, but the problem whether the prisoner had committed larceny divided the Court for Crown Cases Reserved—seven judges[83] said it was larceny, the other seven[84] said it was not. The division of opinion arose on the usual question whether Ashwell took possession of the sovereign at the time of the loan, when he had no *animus furandi,* or whether the 'taking' was postponed until the discovery of the mistake, when the intent to steal was clearly established.

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[78] (1802) 8 Ves.Jun. 406.

[79] A ruling which is strictly in accordance with the old common law as enunciated by 1 Hawkins, Chap. 33, s. 1 and 1 Hale 61.

[80] (1841) 7 M. & W. 623.

[81] *Ibid.,* at p. 631.

[82] (1885) 16 Q.B.D. 190.

Before proceeding further, there is one preliminary observation I want to make. We, in this country, pride ourselves on the fact that where a prisoner is charged with a criminal offence and tried by jury, he cannot be found guilty unless the jury are unanimous in their verdict. What possible justification is there then for the archaic, odious rule—applied by the court in *Ashwell's Case*—of *praesumitur pro negante,* under which, if the court is equally divided, the conviction must stand. To my way of thinking, should there be any uncertainty in the determination of a prisoner's guilt in the sense of an equal division of opinion among the judges hearing the appeal, it should be decided in favour of, not against, the accused.

To revert to *R.* v. *Hudson,* in discussing *Ashwell's Case* the court saw fit to cite three extracts from the judgments in that case. Two of these are from the judgments of Cave, J., and Coleridge, C.J., both of whom were in favour of sustaining the conviction, and read as follows—per Cave., J.[85] :—

> 'In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. A man does not consent to that of which he is wholly ignorant'.

and per Coleridge, C.J.[86] :—

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[83] Cave, Hawkins, Denman, Grove, Pollock, Huddleston, JJ., Coleridge, C.J., of whom only Coleridge, C.J., Cave and Denman, JJ., delivered substantive judgments.

[84] Smith, Mathew, Stephen, Day, Wills, Manisty and Field, JJ., of whom only Day and Wills, JJ., did not deliver substantive judgments.

[85] *Ibid.,* at p. 203; Keeton, *Jurisprudence* (2nd ed.), p. 184 finds it 'hard to resist the force of Cave, J.'s observation'.

[86] *Ibid.,* at p. 225.

> 'In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it'.

Simplicity of expression is an admirable quality, but one may well ask how their Lordships would reconcile their interpretation of the doctrine of possession with the decision in *R.* v. *Rowe* and, not least, the case of *R.* v. *Riley* with its theory of continuous trespass.

The third extract cited, from the judgment of Stephen, J., if taken by itself presents a completely false picture of that eminent judge's views on the question of knowledge and possession in relation to the law of larceny. A far truer summary of Stephen, J.'s, views is obtainable from the following extracts from his judgment in which he said[87]:—

> 'from the earliest times it has always been held . . . that a fraudulent conversion of property after an innocent taking, though in some particular cases criminal by statute,[88] does not amount to larceny at common law. The application of this principle to the present case appears to me direct and obvious. Ashwell received the sovereign innocently, though he dealt with it fraudulently an hour afterwards, when he became aware of its value. The inference that he committed no larceny at common law appears to follow of necessity. . . . The word possession is indeed used in many senses, some of them highly artificial, but this is a bad reason for adding a new artificial meaning to it. Its plain meaning in this case is the reception of the coin by Ashwell from Keogh'.

With that view I am in entire agreement. Nobody would suggest that such dishonest conduct should pass unpunished. The objection I voice is to the pernicious practice of extending the definition of common law larceny to cases which, according to the plain, everyday meaning of the terms used in the definition, are not larceny.

Whether or not some of the judges in *Ashwell's Case* had second thoughts on their decision one cannot tell, but the following year, in *R.* v. *Flowers*,[89] we have the delightful picture of

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[87] (1885) 16 Q.B.D. 190, at pp. 206, 209, 210.

[88] See now section 20 of the Larceny Act, 1916.

[89] (1886) 16 Q.B.D. 643. See too the Irish case of *R.* v. *Hehir* (1895)

Coleridge, C.J., and Hawkins, J., tumbling over one another in their anxiety to explain, first, that they never disputed the old rule of law that to justify a conviction for larceny the receipt and appropriation must be contemporaneous and, secondly, that the case now before them was altogether different from *Ashwell.* But was it? Far more penetrating minds than mine[90] have failed to discover any distinction between the two cases—it is all the more surprising therefore to learn that the Court for Crown Cases Reserved[91] quashed Flowers' conviction for larceny.

What happened was this. The accused and a fellow workman complained that their wage packets were short. Their employer handed over 3d. in coppers to the accused—the amount by which he was short—together with a packet which the employer thought belonged to Flowers. In fact it was the other workman's wage packet. Flowers went outside and on emptying the packet discovered the mistake, saying, 'The biter has got bit, he has paid me double wages'. Showing the money to his mate he declared, with a blissful disregard for his employer's property, 'Come on, we'll go and have a drink on it'. The jury found that the prisoner received the bag and its contents innocently and, there being at that time no *animus furandi,* the court quashed the conviction for larceny. I put it to you, what possible difference is there between my mistakenly giving you, on the one hand, a sovereign believing it to be a shilling and, on the other hand, another person's wage packet containing two sovereigns, which I believe to be yours containing only one sovereign? If, as I submit, there is no difference, how can one possibly reconcile the two cases?

The position today is, to say the least, unsatisfactory and I, for one, am unconvinced by the argument that the doctrine of possession should be flexible, its application being dependent on the merits of each particular case.[92] Accepting the object of reform to be the simplification and easy understanding of the law relating to larceny, and its basis, the consistent application of the

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Ir.L.R. 2 Q.B. 709 where, on facts very similar to *Ashwell,* the Irish Court for Crown Cases Reserved quashed the conviction for larceny by the narrow majority of 5–4.

[90] *Possession in the Common Law,* p. 110. Stephen, *Digest of Criminal Law* (8th ed.), Art. 368.

[91] Coram Coleridge, C.J., Manisty, Hawkins, Day and Grantham, JJ.

[92] See *Current Legal Problems* (1949), Vol. 2, p. 80.

established rules of common law, I suggest there is a short and a long term solution to the problem.

The short term solution is concerned with the acknowledged rule that to be guilty of larceny the 'taking' and *animus furandi* must be contemporaneous. Where in any particular case there is difficulty in deciding the moment of 'taking', the object should not be to vary the doctrine of possession so as to ensure a conviction of larceny. Such dishonest conduct need not go unpunished, and I suggest that the judicial interpretation of fraudulent conversion, an offence created by statute in 1901,[93] is sufficiently wide to cover those unsatisfactory cases referred to in the course of this lecture. Speaking generally, fraudulent conversion is committed where a person becomes entrusted with another's property and fraudulently converts the same to his own or any other person's use or benefit. Its exact scope was considered by the Court of Criminal Appeal in the case of *R.* v. *Grubb* (1915), when the then Lord Chief Justice declared[94]:—

> 'In the opinion of this court a person may be entrusted with property . . . within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he becomes entrusted . . . and fraudulently converts it or the proceeds, then he has committed an offence within the section'.

This test was approved twelve years later by the C.C.A. in *R.* v. *Morter*,[95] its essence clearly being to render criminally liable any person who acquires possession of another's property innocently and later fraudulently misappropriates it. It does not require much stretching of the imagination to see that its scope is sufficiently wide to cover all those laborious cases involving resort to such theories as continuous trespass and postponement of 'taking' to the discovery of mistake in order to justify a conviction for larceny.

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[93] Larceny Act, 1901 (1 Edw. 7, c. 10), s. 1 (1)—see now section 20 (1) (iv) (a) Larceny Act, 1916.

[94] (1915) 11 Cr.App.R. 153, at p. 157.

[95] (1927) 20 Cr.App.R. 53. Reference must also be made to *R.* v. *Jones* [1949] 33 Cr.App.R. 11 in which Lord Goddard, C.J., indicated the necessity of establishing a fiduciary relationship in all cases of fraudulent conversion. Insomuch as no counsel appeared, and no reference was made to either *Grubb* or *Morter*, it is difficult to assess the importance of the L.C.J.'s observation.

In this necessarily brief examination of what is, after all, only a small part of the law of larceny, I have endeavoured to show the need for something more radical, more far-reaching than the short-term solution already indicated. At the end of the last century a draft Criminal Code was prepared with the avowed object of (*inter alia*) greatly simplifying the English law of theft.[96] Like so many other products of previous and subsequent Royal Commissions, its recommendations were assigned into cold storage and have ever since remained dormant. There is no time here to discuss its proposals in detail. Suffice it to say that all the present technical distinctions between larceny at common law, larceny by bailees, embezzlement, fraud by factors and agents, and fraudulent conversion were to disappear under a comprehensive definition of theft.[97] It is a peculiar fact that the Law Revision Committee, in its Eight Reports, has not once been called upon to consider the reform of our criminal law. To that committee, I suggest, should be assigned the task of reviving and, if necessary, revising the draft Criminal Code of 1879, with the principal object of making the English law of theft correspond more closely with the ordinary man's moral conception of stealing another's property.

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[96] See *History of Criminal Law*, Vol. 3, pp. 162–168.

[97] *Ibid.*, at p. 163.

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SOME SOCIAL AND CONSTITUTIONAL ASPECTS OF THE NEW PLANNING LAW

R. C. FitzGerald

I do not think I can do better than to begin this paper[1] with a reference to what Professor L. Dudley Stamp[2] said in his presidential address to the geography section of the British Association in September, 1949, as this will, I believe, enable us to appreciate the necessity for any Government in this country to have caused planning legislation of a very comprehensive character to be passed by Parliament. The professor said that the planning of land use in any country must be viewed against a world background. The world's population of 2,200,000,000 is increasing at a rate of 20,000,000 a year; more rapidly than the application of science to production can augment food supply, and at a time when there are no more virgin lands available for easy conquest. Only slowly was it coming to be realised that the resources of the world were finite, and that the continuance of the human race in the long run must depend upon the intelligent planned use of those resources, especially of food-producing land.[3] The accuracy of those views becomes only too apparent when we turn our eyes to our own country. As is shown in the Scott Report,[4] of European countries England heads the list with 766 persons per square mile, with Germany and Italy at less than half that density, and France approximately a quarter of it. The United States of America have only forty-three persons per square mile. Over one-third of the population in England and Wales lives in the six city-groups or 'conurbations' of Greater London, Birmingham, Manchester, Liverpool, Leeds–Bradford and Tyneside, and over one-half of the population in or near fourteen of the chief urban centres. Further, during the period 1927 to 1939 the loss of agricultural land in England and Wales to other uses was approximately 800,000 acres, *i.e.,* about 60,000 acres a year,[5] a figure which is being at least maintained at the present time. What government, in face of these disturbing facts, would have dared to allow the user of land to remain on its 1939 basis? No government could be so inefficient as to think it was under no duty to take positive action to secure that all the land in the country is put to the use which is best from the point of view of the community. Our present planning law may not meet with general approval—it must be frankly admitted that some parts of it are alien to the traditional British way of life—but it does represent a serious effort to cope with an extremely difficult situation. Let us now turn to a consideration of the planning legislation itself.

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[1] For the purposes of this paper the expression 'the new Planning Law' means the New Towns Act, 1946; Town and Country Planning Act, 1947; Agriculture Act, 1947, and the Agricultural Holdings Act, 1948.

[2] Professor Stamp is the first Professor of Social Geography in England.

[3] *The Times* newspaper, September 3, 1949.

[4] Report of the Committee on Land Utilisation in Rural Areas, No. 6378 of 1942, p. 1, paragraphs 3 and 4.

Although it is clear from the figures given above that the major part of the population of this country lives and works in urban areas, agriculture is still one of the nation's biggest industries, and it must inevitably play a vital part in the national economy. Of a total of 60,000,000 acres of land in the United Kingdom, four-fifths, *i.e.,* 48,000,000 acres, were in 1946 devoted to agricultural use, while agriculture at that time provided employment for approximately 1,250,000 people, excluding those people whose work and lives were closely linked with the agricultural industry.[6] Prior to the Second World War the value of the production of home agriculture was in the region of £290,000,000 a year, a figure which increased to nearly £580,000,000 during that war. No wonder the Government said they attached the greatest importance to the maintenance of a stable and efficient agriculture.[7] The increase, be it noted, occurred when the Government had almost unlimited powers under the emergency legislation—when the traditional relationship of landlord and tenant was practically in abeyance—and it is perhaps not surprising that the Agriculture Act, 1947, puts on a permanent basis the almost full State control of the agricultural industry.

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[5] *Ibid.,* p. 28, paragraph 88. The total loss is there stated to be 794,800 acres, with a yearly average of 66,200 acres. The yearly average is reduced to 60,000 acres to allow for land which has subsequently been returned to agriculture.

[6] The Government White Paper, Cmd. 6996 of 1946, issued when the Agriculture Bill was published in December 1946.

[7] *Ibid.*

That Act, according to the Minister of Agriculture, rests upon the twin pillars of stability and efficiency.[8] Parliament has decided that guaranteed prices and assured markets are the best means of achieving stability, and Part 1[9] of the Act is framed accordingly. The intention behind the provision of guaranteed prices and assured markets for fat cattle, fat sheep, fat pigs, cow's milk (liquid), eggs (hen and duck in shell), wheat, barley, oats, rye, potatoes and sugar beet is to promote and maintain a stable and efficient agricultural industry capable of producing such part of the nation's food and other agricultural produce as in the national interest it is desirable to produce in the United Kingdom, and of producing it at minimum prices consistently with proper remuneration and living conditions for farmers and workers in agriculture and an adequate return on capital invested in the industry.[10] To achieve this the Ministers[11] have a statutory obligation to review annually the general economic condition and prospects of the agricultural industry[12] and to consult with such bodies and persons as appear to them to represent the interests of producers in the agricultural industry.[13] The Ministers will, no doubt, continue to consult, *e.g.*, the National Farmers' Union. These reviews are held in February of each year, and the Ministers' conclusions from them have to be taken into account by a Minister, *e.g.*, the Minister of Food, when fixing or varying any price of the agricultural produce mentioned above.[14] The Ministers are given a statutory power to make orders directing additions to the items of agricultural produce mentioned above,[15] after consulting with such bodies of persons as appear to them to represent the interests of producers of the produce they wish to add to the list. Any such Order must be approved by the Treasury[16] and has no effect unless approved by resolution of each House of Parliament.[17] It is interesting to note that the House of Lords can have an effective say in this connection. The Government decides what agricultural produce it is desirable in the national interest to produce in the United Kingdom, and in arriving at a decision it will, presumably, take into account conditions outside the United Kingdom. Thus, if Argentina continues to be difficult the Government may decide on an increase of livestock in the United Kingdom. The Government have accepted complete liability for assuring a market for the whole output of the produce with guaranteed prices, except oats and sugar beet.[18] In England and Wales farmers usually use their crops of oats as feeding stuff for their livestock, so the question of a guaranteed price is not very important. As regards sugar beet, there is a guaranteed price for the beet taken by the sugar beet factories, so it is up to the farmer not to grow an excess of sugar beet. The produce mentioned above as having guaranteed prices represents about 75 per cent, by value, of the produce sold off farms in the United Kingdom, so that farmers are not left with much produce not having guaranteed prices, but the 25 per cent does include, *e.g.*, such important items as wool and seeds. Any excluded item, however, can be included by Order on the lines already indicated. All this appears to be fairly straightforward and to be in favour of the producers. But, as one would expect, the latter do not get these benefits without giving something in return. It is now that we must consider Part 2 of the Act to ascertain how Parliament has decided that efficiency shall be attained, and we shall then see that those directly connected with the agricultural industry are subjected to State control.

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[8] 432 H.C. Deb. 5 s. 628.

[9] Part 1 came into force on March 31, 1948—S.I. 1948, No. 491—and it extends to Scotland and Northern Ireland; see s. 1 (2).

[10] Agriculture Act, 1947, s. 1 (1) and the First Schedule to the Act.

[11] *I.e.* the Minister of Agriculture and Fisheries and the Secretaries of State concerned with agriculture in Scotland and Northern Ireland, acting jointly—see s. 8 (1).

[12] Section 2 (1).

[13] Section 2 (3).

[14] Section 3 (1).

[15] Section 6 (1).

[16] Section 7 (1).

[17] Section 7 (2).

An owner of agricultural land is now under a statutory duty to manage his land in accordance with the rules of good estate management,[19] the test being: Is his management of the land such as to be reasonably adequate, having regard to the character and situation of the land and other relevant circumstances, to enable an occupier of the land reasonably skilled in husbandry to maintain efficient production as respects both the kind of produce and the quality and quantity thereof?[20] One factor to be taken into account when answering this question is the extent to which the owner is providing, improving, maintaining and repairing fixed equipment on the land to enable such an occupier to maintain efficient production as aforesaid.[21] The statutory duty, however, does not make the owner liable to do anything as regards the maintenance and repair of fixed equipment which the tenant has agreed to do.[22] No longer is it possible for the owner's lawyer, when drafting the tenancy agreement, to put upon the tenant the burden of providing and improving fixed equipment. As for the occupier, he has to farm the land in accordance with the rules of good husbandry, the test here being: Is he, having regard to the character and situation of the land, the standard of management thereof by the owner, and other relevant circumstances, maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the land in a condition to enable such a standard to be maintained in the future?[23] The Act expressly provides that in arriving at a decision on this point, certain matters and things are to be taken into account, *e.g.*, the extent to which the manner in which the arable land is being cropped is such as to maintain that land clean and in a good state of cultivation and fertility and in good condition,[24] and the extent to which the necessary steps are being taken to secure and maintain crops and livestock free from disease and from infestation by insects and other pests.[25] If the occupier is not the owner then his responsibilities do not include an obligation to carry out any work of maintenance or repair which the owner is liable for under the rules of good estate management.[26] If an owner or occupier fails to fulfil his responsibilities the Minister, after affording the owner or occupier, as the case may require, an opportunity of making representations[27] to the Minister, has the right to make a supervision order. The making of such an order has serious consequences for the owner or occupier against whom it is made. For instance, any person authorised by the Minister may at all reasonable times enter upon the land to inspect the way in which it is being managed or farmed[28]; the Minister has to review the situation every twelve months[29] and must give the person to whom the order relates an opportunity of making representations.[30] The person to whom the order relates cannot free the land from these consequences by disposing *inter vivos* of his interest in the land to someone else, as unless the Minister approves the disposition, the new owner or occupier will be as much bound by the order as if it had been made against him originally.[31] Of course, when the Minister is satisfied that the proper standard of management or husbandry has been attained by the person affected by the order, the Minister has power to revoke the order.[32] Nor is this all. While the supervision order is in force the Minister has power to give the appropriate person such directions as the Minister is satisfied are required to secure that that person fulfils his statutory responsibilities as to good estate management or good husbandry, as the case may be.[33] The average member of the farming community is a person of sturdy independence, with a mind of his own, and there is always a possibility, not to say probability, that he will fail to comply with a ministerial direction; or else comply with it in a way different from that desired by the Minister. Is such individuality to be tolerated in the middle of the twentieth century? Apparently not, as the Act contains provisions making such a difficult person liable on summary conviction to a fine not exceeding £100,[34] and giving the Minister power to carry out the work required by the direction and to recover the reasonable cost of doing so from the defaulting person.[35] To minimise the risk that the unpopularity of the person doing the work for the Minister will provoke active hostility, the Act provides that any one who obstructs such a person shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £100 or to both such imprisonment and such fine.[36] In reality, owners or occupiers of agricultural land will have to cope with the County Agricultural Executive Committees, as the Minister, pursuant to his statutory power to do so,[37] has delegated the powers to make, review and revoke supervision orders; to approve dispositions of land under supervision; to give directions; and so on, to those committees.[38] Up to August, 1949, 939 farmers in England and Wales, out of an approximate total of 350,000 farmers, had had supervision orders made against them. Devon topped the list with forty-six, but that is what one would have expected, as Devon is a large county with numerous small farmers, who find it very difficult to maintain a high standard of arable farming through the years since 1940, when an abnormally large acreage in that county was brought under the plough.[39] The dreadful thing from the point of view of these 939 farmers or, for that matter, of any person against whom a supervision order is made under the Act, is that the Minister has the power of dispossession. This means, in the case of an owner, that the Minister has power to purchase compulsorily the land to which the order relates,[40] and in the case of an occupier, his interest in the land can be terminated by the Minister, who can then require the owner either to farm the land himself, if he so elects, and the Minister approves, or to let it to a tenant approved by the Minister.[41] Normally the power of dispossession cannot be exercised before twelve months have elapsed since the coming into operation of the supervision order,[42] and the person affected must be given an opportunity of making representations to the Minister,[43] and he is entitled to have the matter referred to the Agricultural Land Tribunal.[44] If an occupier remains in possession of the land beyond the date law-

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[18] Announced by the Minister of Agriculture in the House of Commons on the Third Reading of the Bill on June 9, 1947. 438 H.C. Deb. 5 s. 716.

[19] Section 9.

[20] Section 10 (1).

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[21] Section 10 (2). The expression 'fixed equipment' is new, and is defined by s. 109 (3) of the Act.

[22] Section 10 (3).

[23] Section 11 (1).

[24] Section 11 (2) (b).

[25] Section 11 (2) (d). Other matters to be taken into account are set out in s. 11 (2) (a), (c), (e) and (f).

[26] Section 11 (3).

[27] The provisions as to representation are set out in s. 104, and the Agriculture (Making of Representations) Regulations, 1948—S.I. 1948, No. 191.

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[28] Section 12 (1) (a).
[29] Section 12 (2) (a).
[30] Section 12 (2) (b).
[31] Section 13. The Minister can give his consent either before or after the disposition is completed: s. 13.
[32] Section 12 (3).
[33] Section 14 (1).
[34] Section 14 (4).
[35] Section 14 (5).

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[36] Section 14 (7).
[37] Section 72.
[38] Agriculture (Delegation to County Agricultural Executive Committees) Regulations—S.I. 1948, No. 187—which came into force on March 1, 1948.
[39] *The Times* newspaper, August 15, 1949.
[40] Section 16 (1).
[41] Section 17 (1) (a).
[42] Section 16 (7) and s. 17 (4).
[43] Section 16 (4) and s. 17 (2).
[44] Section 16 (5) and s. 17 (3).

fully specified by the Minister, the latter may make complaint to a court of summary jurisdiction, whereupon the court must order that vacant possession of the land shall be given to the Minister forthwith.[45] In certain circumstances the Minister himself may take possession of the land for the purpose of farming it,[46] and if he does he is under a duty to see that it is farmed in accordance with the rules of good husbandry.[47]

Guaranteed prices and markets are a big step forward from the state of affairs which existed prior to the outbreak of war in 1939. They mean social security for the workers in the industry, and when one remembers that forty per cent of all our farms are fifty acres or under, with little or no hired labour,[48] one sees at once the importance of the Act from that point of view. But in the days of free prices and no guaranteed markets the element of competition provided an incentive to efficiency, which incentive no longer exists. It may be that the threat of dispossession is a means of keeping farmers up to scratch, but it would seem that there are too many inefficient farmers. Various reasons have been put forward to explain such a state of affairs. One is that most farmers have insufficient capital,[49] and that after buying a tractor there is no money left to buy what goes with it. This draws forth the retort that the chief substitute for capital is co-operation, *e.g.*, the joint uses of farm equipment.[50] But it would seem there is ample evidence that voluntary co-operation between British farmers does not usually work. 'It is simply that if four men agree to share a tractor they will almost invariably all want to use it at the same time. This leads to argument, and results in the end in each of them doing his utmost to make himself independent of the others'.[51] In this connection it should be remembered that the County Agricultural Executive Committees, under Government direction, are in most counties providing, on easy terms on an appeal from the farmer, both the required equipment and, if need be, skilled labour to operate it.[52] What, then, are the causes of the apparent disinclination of farmers to co-operate to the extent that they should, apart from natural disinclination? Have they complete faith in the personnel of the County Agricultural Executive Committees? Do they resent these committees being used simply as backings for the rulings of the Ministry on all sorts of matters? In other words, are politics having an undesirable influence in the industry? In June, 1949, Mr. Thornton-Kemsley, M.P., asked the Minister of Town and Country Planning on what grounds the Central Land Board have ruled that houses erected for, and occupied by, a farmer, a farm bailiff or manager or the resident agent of an agricultural estate, do not qualify for the special arrangement as to development charge made in respect of houses reserved for members of the agricultural population under the Town and Country Planning Act, 1947. Mr. Silkin, the then Minister, in a written answer, said that such houses do not come within the concession promised when the Bill was before Parliament. The concession, he said, was made to foster agriculture by encouraging the building of cottages for farm workers, and the Minister saw no reason to extend it to the classes of persons mentioned in the question.[53] From the Minister's reply it would appear that a distinction is drawn between the various classes of workers in the industry. On June 23, 1949, the then Chairman of the Central Land Board said, in reply to a question on the point, that there was no authority for not collecting the development charge for agricultural cottages except that a promise was made in Parliament during the passage of the Bill that it would not be done. The Board, he said, were subject to directions of Ministers and they were told not to collect it.[54] In July, 1949, it was announced at a press conference at the House of Commons that the Minister of Agriculture is to be the first President of the newly formed British Socialist Agricultural Society. One of the main objects of the society is to defend British agriculture against all attacks from vested interests engaged in the importation of food. Replying to a question as to whether the society would have political as well as agricultural activities, the Parliamentary Secretary to the Ministry of Agriculture, a member of the provisional committee, said that the society must, of course, be active politically. It was impossible to take agricultural problems out of politics.[55] The National Union of Agricultural Workers has called for closer supervision of farmers and the general use of cropping directions to ensure a planned industry and properly supervised acts of husbandry. Its president has told the House of Commons that with a return to some form of direction 'the efficient farmer who is concerned with the welfare of the State will have nothing to fear'.[56] Utterances of this kind can have a disturbing effect on the farming community. The Act, and everything done pursuant to the Act, vitally affect the whole community, and the State, now that it has become at least a partner in the industry, must see that everything done pursuant to the Act is done for the nation as a whole, and it must not do or encourage anything which even appears to be prejudiced or biased on political grounds.

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[45] Section 17 (7).

[46] Section 18 (1).

[47] Section 18 (2).

[48] See the letter from Mr. G. A. Martelli in *The Times* newspaper, October 3, 1949.

[49] *Ibid.*

[50] See the letter from Lord Bledisloe in *The Times* newspaper, October 7, 1949.

[51] See the letter from Mr. G. A. Martelli in *The Times* newspaper, October 17, 1949.

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[52] See the letter from Lord Bledisloe mentioned in footnote 50 above.
[53] *The Estates Gazette,* July 9, 1949, p. 49.
[54] *Ibid.,* August 20, 1949, p. 144.

Further evidence that planning legislation is part and parcel of a planned economy is furnished by the Town and Country Planning Act, 1947. As its Preamble tells us, it is an Act to make fresh provision for planning the development and use of land, for the grant of permission to develop land and for other powers of control over the use of land; to confer on public authorities additional powers in respect of the acquisition and development of land for planning and other purposes, and to amend the law relating to compensation in respect of the compulsory acquisition of land; to provide for payments out of central funds in respect of depreciation occasioned by planning restrictions; to secure the recovery for the benefit of the community of development charges in respect of certain new developments; to provide for the payment of grants out of central funds in respect of expenses of local authorities in connection with the matters aforesaid; and for purposes connected with the matters aforesaid. The Preamble certainly contains something to satisfy all tastes! Moreover, it shows the change in outlook during the last fifty years or so. In 1895 the well-known case of *Mayor of Bradford* v. *Pickles*[57] was decided by the House of

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[55] *The Estates Gazette*, July 16, 1949, p. 51.

[56] *The Times* newspaper, August 15, 1949.

[57] [1895] A.C. 587.

Lords, and in the course of his judgment Lord Ashbourne said, when referring to Mr. Pickles, who had diverted or appropriated percolating water within his own land so as to deprive his neighbour of it, 'If his [Pickles] motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal'.[58] Lord Macnaghten said, 'He [Pickles] prefers his own interests to the public good. He may be churlish, selfish and grasping. His conduct may seem shocking to a moral philosopher'.[59] In 1895 it was legal rights that mattered, not personal motives. Such views appear strange to the average person living in the modern collectivist State, and if they were expressed now they would be dubbed as reactionary and anti-social. We have reached the stage of civilisation when permission is required in respect of any development of land.[60] What this means in everyday life can be gathered from a perusal of the Bulletins of Selected Appeal Decisions issued by the Ministry of Town and Country Planning.[61] An owner of land is entitled to use his land for the purpose for which it was being used on July 1, 1948, but if he wishes to 'develop' his land, *i.e.*, wishes to carry out building, engineering, mining or other operations in, on, over or under his land, or to make any material change in the use of any buildings, or other land[62] then he must obtain planning permission.

Thus, the use as two or more separate dwelling-houses of any building previously used as a single dwelling-house involves a material change of use, and therefore planning permission is necessary.[63] The deposit of refuse or waste materials on land involves a material change of use, notwithstanding that the land is comprised in a site already used for that purpose, if the superficial area or the height of the deposit is thereby extended,[64] and consequently planning permission is necessary. But holes in the land can be filled in without planning permission![65] If a landowner wishes to erect a gate or a fence more than seven feet in height he must get express planning permission.[66] Camping may amount to development and so require planning permission, while an owner of a dwelling-house who is so anti-social as to want to put up an outbuilding higher than ten feet and with a bigger cubic capacity than 1,000 cubic feet will be put to the trouble and expense of obtaining planning permission. It is not yet fully realised how extensive are the powers of the Minister of Town and Country Planning, but the dawn of realisation is breaking and criticism is growing stronger. The Minister has made the Town and Country Planning (Making of Applications) Regulations, 1948,[67] and an applicant for planning permission and assessment of a development charge must follow the procedure laid down in these regulations. Forms have to be filled in, numerous questions answered and plans supplied; and the ordinary landowner, in sheer desperation, is forced to seek and pay for professional advice. The applicant has, in the first place, to deal with the local planning authority, and if their attitude is not considered reasonable by the applicant he has a right to appeal to the Minister,[68] who may or may not see eye to eye with the applicant. A glance at the Bulletins of Selected Appeal Decisions of the Minister shows the extent to which the use of land in this country is now controlled by the Minister. Thus, he has had to give decisions affecting extensions to a factory in a seaside town[69]; amusement arcades in a business zone[70] and in a holiday resort[71]; a fish-frying shop in a general business zone[72]; the re-erection of a bungalow destroyed by fire[73]; the conversion of a small house into two flats[74]; the erection of a pottery in an area provisionally zoned as residential[75]; the use of land in a proposed rural zone for dog-breeding[76]; the erection of cottages for brewery workers in a rural zone[77]; the extension to a factory in an over-industrialised area.[78] No aspect of everyday life connected with use of land is beyond the reach of the Minister, and this state of affairs is bound to have far-reaching effects on the future social, political and economic life of the country. As the Minister himself has said,[79] he often has to 'weigh the claims of science or amenity against those of the fighting forces—for instance, birds against bombs. It would be easy to get quick popularity by always deciding in favour of the birds. But town planning is not merely a matter of preserving certain aspects of life—beauty, for instance, or wild nature—but of weighing the conflicting claims upon the use of the land of our small island . . .'. Whoever is Minister, he has a thankless task. He cannot please every one. Sometimes he is accused of being too generous to public authorities, but he has been known to be on the side of the small man. He upheld the appeal of the London County Council from the refusal of the Surrey County Council to allow 210 acres in the area of the North Downs at Merstham, Surrey, to be developed as a housing estate for 6,000 people. The chosen site lies wholly within the Green Belt and is scheduled in the Greater London plan as a non-agricultural open space, and that was the basis of the original objection. The Minister of Health overruled that objection with, as *The Times* said, 'not for the first time, the backing of Mr. Silkin . . .'.[80] The fellow, too, who had erected a small timber shed in the garden of his house for storing cycles and garden tools, and who applied for permission to replace it by a brick garage 20 feet long and 10 feet wide to accommodate a medium-sized motor car, his garden tools, and possibly a motor cycle, but whose application was turned down by the Council on the ground that the size of the proposed garage was excessive, found on appeal, that the Minister was quite friendly. The Council thought it desirable to control the size of private garages as they feared that if unusually large buildings were permitted there was a risk of their being used for other than domestic purposes. The Minister thought, *inter alia,* that the adoption of an arbitrary maximum size for domestic garage buildings was difficult to justify, and as he considered that the proposed garage would not be injurious to amenities, he gave permission for the proposed garage to be erected.[81]

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[58] [1895] A.C. 587, at p. 599.

[59] *Ibid.*, at p. 601.

[60] Town and Country Planning Act, 1947, s. 12 (1).

[61] No. 1, September 1947; No. 2, December 1947; No. 3, April 1948; No. 4, August 1948; and No. 5, March 1949.

[62] Town and Country Planning Act, 1947, s. 12 (2).

[63] Section 12 (3) (a).

[64] Section 12 (3) (b).

[65] Proviso to s. 12 (3) (b).

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[66] General permission to erect a gate or fence not exceeding 7 feet in height is given by the Town and Country Planning (General Development) Order, 1948—S.I. 1948, No. 958.

[67] S.I. 1948, No. 711.

[68] Section 16.

[69] *Bulletin No. 1* (1947), p. 7.

[70] *Ibid.*, p. 11.

[71] *Ibid.*, pp. 11–12.

[72] *Bulletin No. 2* (1947), pp. 7–8.

[73] *Ibid.*, pp. 13–14.

[74] *Ibid.*, p. 14.

[75] *Bulletin No. 3* (1948), pp. 3–4.

[76] *Ibid.*, p. 10.

[77] *Bulletin No. 4* (1948), pp. 12–13.

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[78] *Bulletin No. 5* (1949), pp. 3–4.

[79] At the annual luncheon of the Society for the Promotion of Nature Reserves held on June 22, 1949. See *The Estates Gazette,* June 25, 1949, p. 539.

[80] *The Times* newspaper, August 20, 1949, the leading article headed 'Plans and Second Thoughts'.

A far more serious aspect of the Town and Country Planning Act, 1947, are its provisions levying a development charge in respect of development. On July 1, 1948, all development rights in every inch of land in England and Wales were, by this Act, confiscated by the State, *i.e.*, vested in the State without provision for the payment by the State of adequate compensation. The State now has a monopoly of development of land. As the new Deputy-Chairman of the Central Land Board said in his first public address, 'The Town and Country Planning Act, in effect, nationalises the development rights of all land in the country',[82] and if a landowner wishes to develop his land he must purchase the right to do so from the State through its recognised agent, the Central Land Board. Pursuant to statutory power[83] the Central Land Board have laid down general principles to be followed by the Board in determining whether any, and if so what, development charge is payable.[84] The Governing Principle provides that development charge shall be determined so as to secure, so far as practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. 'The Board regard it as vital that developers should not have to pay twice over for development value—once in the price of land and again in development charge. They therefore noted with concern some weeks after the Acts came into operation that despite the liability for development charge, land was still being widely offered and, still worse, taken at prices including the full development value. Many owners were offering to assign their right to a Part 6 payment as part of the transaction, but some were not'.[85] Now this solicitude for purchasers of land is out of place coming from the Board. It would have been much more to the point if the Board had suggested to the Minister that the reluctance on the part of owners to sell land at existing use value might be due to the feeling that it is dishonest for the State to take a person's property without paying proper compensation for it. The Board themselves give an example of where the market price for some land before July 1, 1948, was about £434. On that date the State became the owner of the development rights in the land, and the value of the land to the owner was reduced to about £20.[86] He had a right to claim on the £300,000,000 fund—note, a right to claim, not a right to receive proper compensation, and even if his claim were approved by the authorities he will, most probably, not receive payment until 1953, and then in Government stock! Was it any wonder that the owner turned down an offer of £40 for the land? He preferred to keep his land. But the authorities apparently intend to force their views on the landowning community, as the Board have, up to October 3, 1949,[87] made nine orders for the compulsory purchase of land from persons who have not done as the Board wish, and there is still money available for the Board to indulge in the making of further similar orders. As I have stated elsewhere, this attitude of the authorities is unnecessary bureaucratic interference.[88]

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[81] *Bulletin No. 5* (1949), p. 10.

[82] Sir Robert Fraser, when addressing the Scottish National Housing and Town Planning Council at Perth on October 15, 1949.

[83] Town and Country Planning Act, s. 70 (3).

[84] See Town and Country Planning (Development Charge) Regulations, 1948—S.I. 1948, No. 1189.

[85] Report of the Central Land Board for the period to March 31, 1949 (No. 223, H.M.S.O.), paragraph 43.

The imposition of a development charge by the Board is really the levying of a tax on His Majesty's subjects. As it is done by authority of the King in Parliament it cannot be unlawful, and I cannot advise any one to assume the rôle of a modern Hampden.[89] But the principles involved are of the utmost importance. Members of the Central Land Board have not, legally, the same security of tenure as the judges, as the Minister decides the term for which the members shall be appointed and the conditions of their appointment.[90] Theoretically it is possible for pressure to be put on the Board, and on this ground alone there should be a right of appeal from decisions of the Board concerning assessment of development charges. We already have the admission of the first Chairman of the Board that they are subject to directions of Ministers and have been told not to collect development charge on agricultural cottages.[91] Of course, another ground is that the Board *could* make a mistake in an assessment. In May, 1949, Lord Simon proposed in the House of Lords that any person aggrieved by a decision of the Central Land Board should be able to appeal within twenty-eight days to the Lands Tribunal, and he wanted a clause to that effect inserted in the Lands Tribunal Bill. His motion was carried by sixty-eight votes to twenty-two, but later in the same month the Attorney-General moved, in the House of Commons, a motion disagreeing with the Lords' Amendment, and the Attorney-General won the day by 225 votes to 129. The result is that there is no appeal from the Central Land Board, which is a most undesirable state of affairs. Lord Llewellyn thought that the Government was going back to something very akin to the Star Chamber. The first Chairman of the Board has stated that if there were a right of appeal from decisions of the Board it would save the Board a lot of headaches from their point of view.[92] Why does the Government object to the citizen having a right of appeal?

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[86] Report of the Central Land Board for the period to March 31, 1949 (No. 223, H.M.S.O.), paragraph 48.

[87] Pursuant to s. 43 of the Act.

[88] See 'Town and Country Planning Act, 1947—Bureaucratic Interference', *The Solicitor* (1948), Vol. 15, p. 267 *et seq.*

[89] *R.* v. *Hampden* (The Case of Ship Money) (1637) 3 St.Tr. 825. See also *Bates's Case* (The Case of Impositions) (1606) 2 St.Tr. 371.

[90] Central Land Board Regulations, 1947—S.R. & O. 1947, No. 2294.

In the opinion of many competent judges the system of development charge is holding up essential and desirable development of the country's land, but the Minister does not agree, his view being that 'Development has been held up because of the general economic situation. There is a shortage of labour and material, and it is necessary to conserve our resources'.[93] In any event, it is admitted that development is being held up, and it cannot be denied that persons wishing to enter into transactions concerning land feel frustrated, and attribute that frustration to the working of the Town and Country Planning Act, 1947. In one case the asking price of a plot of land before July 1, 1948, was £475. The plot has since been sold at existing use value. The purchaser has been told by the Board that if he erects a house on the land the development charge will be £550. In spite of the purchaser's objection the Board are adamant and have informed him that the site was too cheap. As a result of the Act the purchaser has to pay to the State more in development charge that he could have obtained the land for before the Act. So much for the wicked landowner![94] In another case an ex-Service man, living with his wife and two children of opposite sexes in ground floor accommodation, comprising two rooms and a kitchen, took the opportunity of buying the whole house when vacant possession of similar accommodation on the floor above became available, thus giving his family decent housing conditions. The Board contends that the change of use from two dwellings into one dwelling is not exempt, and that development charge is payable.[95] The 'man in the street' is not always wrong, neither is the planner always right. The Minister (in a written parliamentary answer, on July 5, 1949) has stated that the total revenue received on development charges from July 1, 1948, to July 1, 1949, was £1,025,025, and that in addition development charge to the amount of £1,047,500 had been determined up to May 31, 1949, and set off against claims on the £300,000,000.[96] Do these meagre sums really compensate for the bitterness for which the Act is responsible?

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[91] See footnote 54 above.

[92] Sir Malcolm Eve's Address to the Town Planning Institute on June 23, 1949.

[93] Mr. Silkin, when addressing the delegates at the opening session of the Town and Country Planning Summer School held at St. Andrews University in August, 1949.

Will regimented town and country planning give our descendants something superior to what we ourselves have inherited? Look at what is in fact happening. Part of North Wales is expected to be declared a national park, so the British Electricity Authority gets out a £20,000,000 hydro-electric scheme, which will destroy the proposed national park. Lulworth Cove (in Dorset) and the lovely Purbeck Hills to the east used to make one of the most famous beauty spots in the country. Today the area presents a sad picture of devastation and ugliness. A coastline of about five miles to the east of the cove is closed, and tank gunnery ranges extend about four miles inland. Before the war about 1,000 acres were used for military purposes, but that figure has now increased to 8,500.[97] It is proposed to erect a line of electric pylons across the Malvern Hills, from Worcestershire into Herefordshire,[98] when apparently the line could be taken underground. Open-cast coalmining on agricultural land, which forces the farmers concerned to sell livestock when their pastures are torn up, and to keep valuable implements lying idle for years in sheds, no satisfactory reinstatement of the land being made when the mining is finished and when, in any event, the top-soil has been rendered sterile.[99] These are but a few examples of the bad things which are being done. On the other hand, many other bad things have existed for far too long. According to figures gathered by the British Institute of Public Opinion in 1944, 6 per cent of the houses in Great Britain have no water laid on inside the house, 40 per cent have no indoor sanitation, and 36 per cent no piped hot water supply. Overcrowding in many rural districts is as acute, probably, as in the towns, aggravated as the evil is, so often, by the lack of public services, particularly water supplies and sewerage, which towns enjoy.[100] Further, as Sir James Turner, the President of the National Farmers' Union, has pointed out, there is a need to extend rural water supplies. Only 37 per cent of the farm buildings in England and Wales have a piped water supply. A good supply of water to fields is also essential if livestock are to be kept in any numbers, but only 16 per cent of all agricultural holdings in England and Wales have such a supply; 42 per cent rely on streams and rivers, 29 per cent have other water sources, and 13 per cent have none.[101]

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[94] Letter of Mr. S. L. Townsend Green in *The Estates Gazette,* July 30, 1949, p. 97.

[95] See letter from Mr. W. H. Simpson in *The Estates Gazette,* August 27, 1949, p. 167.

[96] *The Estates Gazette,* July 16, 1949, p. 59.

[97] *The Times* newspaper, September 24, 1949.

[98] See Mr. A. C. Rayner-Wood's letter to *The Times* newspaper, August 15, 1949.

As I see it, our new planning law must inevitably have a profound influence on the political, economic and social life of the country. Through the Agricultural Land Commission, the members of which have to comply with 'such directions of a general character' as the Minister may give to them,[102] and the County Agricultural Executive Committees, the members of which must comply with any (not merely general) directions given by the Minister, the State (*i.e.*, the Government for the time being) has the means to force those persons connected with the agricultural industry to do as the State directs. All the members of the said Commission are appointed by the Minister (the appointments made by the Minister in December, 1947, were all for part-time service and for an initial period of three years), while five out of the twelve members of a County Agricultural Executive Committee are directly appointed by the Minister, the other seven being appointed by the Minister from persons nominated, as to three members by farmers, as to two by workers, and as to the remaining two by owners. The appointment of any member of such a committee may be revoked by the Minister on the ground, *inter alia,* that in the Minister's opinion he is unsuited to continue to discharge his duties.[103] The County Agricultural Executive Committees may, and must if the Minister so requires, appoint sub-committees and district committees.[104] The Ministers appoint the members of the Central Land Board,[105] who have to comply with such directions of a general character as may be given to them by the Minister,[106] and the functions of the Board are exercised on behalf of the Crown.[107] The members of the development corporations which have to be set up[108] to develop sites designated[109] by the Minister of Town and Country Planning for new towns are appointed by the Minister after consultation with such local authorities as appear to him to be concerned with the development of the new town, and any member may be removed from office by the Minister if the latter is satisfied that such member 'is unsuitable to continue as a member'.[110] There is thus ample administrative machinery for State control of the widest possible character. There are no adequate checks on, or safeguards against, the exercise of dictatorial power. His Majesty's judges have only a minor rôle, if they have any rôle, to play as regards this planning legislation, for the simple reason that the legislation does not enact law of the kind to which we have hitherto been accustomed. Disputes arising out of the legislation will be mainly of an administrative character, for the settlement of which His Majesty's ministers and not his judges will be responsible. Administrative sovereignty and public administration are the order of the day.

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[99] See Mr. David Engleheart's letter in *The Times* newspaper, August 3, 1949.

[100] 'The Problems of Planning Rural Areas and the Location and Development of Villages', a paper read by Dr. C. S. Orwin at the Town and Country Planning Summer School, St. Andrews University, 1949.

[101] 'The Battle for Food', a paper read by Sir James Turner to the Royal Society of Arts on November 9, 1949. *Journal of the Royal Society of Arts*, Vol. 98, pp. 54–62, at p. 62.

[102] Agriculture Act, 1947, s. 68 (7).

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[103] Agriculture Act, 1947, Ninth Schedule, paragraphs 9 (3) and (4).

[104] *Ibid.,* s. 71 (3) and (4).

[105] Town and Country Planning Act, 1947, s. 2; Central Land Board Regulations, S.R. & O. 1947, No. 2294.

[106] Town and Country Planning Act, 1947, s. 3 (1).

[107] *Ibid.,* s. 3 (3).

[108] New Towns Act, 1946, s. 2 (1).

[109] *Ibid.,* s. 1 (1).

[110] *Ibid.,* Second Schedule, paragraphs 1 and 5 (d).

The exercise of the wide and coercive powers given to ministers by this legislation must alter the social life of the country. Every order designating a site for a new town (and the Minister has already made nine,[111] and more are on the way, involving an expenditure well in excess of £225,000,000) means changes in our way of life. Each order means, *e.g.*, that a very large area of land, say 4,000 acres, will pass into public ownership for better or worse. It will be developed according to ministerial wishes,[112] and the greatest interest that a citizen will be able to acquire in a property forming part of the new town will be a lease for ninety-nine years, unless the Minister decrees otherwise.[113] The average Englishman has always striven to become the freeholder of his home. One building society alone has, in the course of its 100 years' existence, advanced more than £260,000,000 to assist home ownership, and it estimates that it has enabled more than 400,000 families to possess that capital stake in the country.[114] Nearly £264,000,000 was advanced by the building societies in the year 1948, largely for house purchase, and the total funds of the member bodies of the Building Societies Association total £1,037,000,000.[115] Home ownership is part of the Englishman's idea of freedom, and one of his ambitions, to achieve which he has always been willing to work hard and practise thrift, two virtues which now appear to be looked upon as old-fashioned. The present social policy underlying our planning legislation will produce a different type of citizen. The generation now growing up is being led to believe that public ownership of all land is one of the most desirable things, and that until that is achieved the use of land must be completely controlled by ministerial edict, of course in the interests of the people. The citizen must look to the State

[111] Stevenage, Crawley, Hemel Hempstead, Harlow, Aycliffe, Easington, Welwyn Garden City, Hatfield, and Corby.

[112] New Towns Act, 1946, s. 2 (3) and s. 3.

[113] *Ibid.*, s. 5.

[114] Sir Harold Bellman, the Chairman of the Abbey-National Building Society, at the centenary dinner of the Society held on October 3, 1949. See *The Times* newspaper, October 4, 1949.

[115] *The Building Societies Year Book*, 1949.

to decide where he shall live and in what kind of property, and he must concede to the State an unfettered discretion to turn him out of his home should some minister or an underling think he is too 'unsuitable' to continue to be a tenant. He must not think of acquiring a house with the aid of a building society. Does not that mean, according to a Minister of the Crown, going to a moneylender? What he must be willing and sufficiently obedient to do is to become a tenant of a State-owned house or flat, along with 40,000 or so other human beings with a similar outlook, on a site designated for them by some all-knowing minister, who will relieve him of the necessity of deciding even such a trivial matter as to whether it would make the State-owned flat more homely to have a cat or a canary, or both. The bureaucrat will decide for him. As Professor Stamp has pointed out, the planning of land use is not an end in itself; its purpose is to improve the standard of living of the people.[116] Are we sure that the ministerial policy underlying our present planning legislation will, when carried out, inevitably result in a higher standard of living? Or will it prove to be the case that in endeavouring to satisfy the demand for economic security we have lost our liberty, that our planned economy has destroyed our democratic way of life? If so, will we be enjoying a higher standard of living? Man cannot live by bread alone. There is a real danger that the limitations put by our present planning legislation on individual rights of property and freedom of contract will kill the vitality of the individual and encourage him to shelve what, up to recent times, have been considered to be his responsibilities. Does the Englishman really want the discipline which the system of planning provided for by this legislation demands? His governors tell him he does, but are they right? I suggest an honest answer is that he wants something better in the future than he has had in the past, provided the price he pays for it in the way of regimentation and bureaucratic control is kept within reasonable limits. The time has come for him to be told in a straightforward manner that under the present system there are no limits, and that the price he is being called upon to pay is fantastic. But perhaps the murmurings that one hears are an indication that John Citizen is bestirring himself, and is again about to think for himself.

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[116] See his letter in *The Times* newspaper, May 3, 1949.

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THE LAW OF COURTS MARTIAL

D. C. Holland

Several events having an important bearing on the law relating to courts martial have occurred during the year nineteen hundred and forty-nine. In January the Lewis Courts Martial Committee published their Report[1] in which they reviewed the existing courts martial system and made many important recommendations for procedural reforms. In the same month the Divisional Court of the King's Bench Division gave two decisions of the utmost importance concerning the problem of civil control over court martial proceedings, namely, *R.* v. *Secretary of State for War, ex parte Martyn*[2] and *R.* v. *O/C Depot Battalion, R.A.S.C., Colchester, ex parte Elliot.*[3] These events are not only of interest to the lawyer but, in these days, are also of interest and importance for the general public in view of the recent introduction of compulsory military service in peace time. In the past, I would suggest, there has been a regrettable tendency to adopt the argument, or at least the attitude of mind, that the number of persons affected by military law and the courts martial system is relatively small and every member of the Forces has, after all, voluntarily submitted himself to the existing system with all its defects. The view that there has been such a tendency in the past is fortified by the words of the Courts Martial Committee who state in the Introduction to their Report[4]: 'It is no longer true to say that every member of the Forces has, after all, voluntarily submitted himself to the existing system with any imperfections it may have—a consideration which (quite properly at the time, influenced the Oliver Committee'.[5] Whether or not the consideration was proper is, I think, a matter of some doubt, but at any rate the Committee agree that the tendency was there. The introduction of large scale conscription in peace time has in any case rendered the argument or attitude of mind completely unjustifiable.

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[1] Cmd. 7608 [1949].

[2] [1949] 1 All E.R. 242.

[3] [1949] 1 All E.R. 373.

[4] Cmd. 7608 [1949] p. 4, para. 7.

[5] For the Oliver Committee's Report, see Cmd. 6200 [1938].

The Report of the Lewis Courts Martial Committee[6] is largely concerned with the following problems: delays before trial, insufficiency of legal aid before and during trial, defects in procedure, and the insufficient right of appeal. These matters are of undoubted public interest and importance but they are matters concerning which full information can be obtained from a perusal of the Report and the present writer has, in any case, already briefly considered them in another place.[7] That defects do exist in the courts martial system is notorious, and the general nature of those defects can be seen from the list of matters with which the Committee dealt. There are, however, three reforms of general legal interest, which were not considered by the Committee at all, and which I would suggest might well be introduced in view of the acknowledged defects in the existing system. The three reforms are (1) an extension in the present control exercised by the civil courts over court martial proceedings, (2) the curtailment of the jurisdiction of courts martial, and (3) a more precise definition of the scope of some of the military offences with which courts martial have jurisdiction to deal. It is with these three matters that this paper is concerned.

I—CIVIL CONTROL OVER COURTS MARTIAL

The first matter to be considered then is that of the control of courts martial by the civil courts. In view of the acknowledged faults of the courts martial system it might well be expected that the civil courts would keep a vigilant eye on courts martial and exercise a strict control over them. In practice the control appears to be extremely shadowy. As is well known, the control is exercised by means of the prerogative orders of prohibition, certiorari and mandamus, and the prerogative writ of habeas corpus. The question to be considered is in what circumstances and upon what grounds will the orders and the writ be issued in respect of court martial proceedings. In 1792 in the case of *Grant* v. *Gould*[8] Lord Loughborough stated the position to be as follows: 'The court being established in this country by positive law, the proceedings of it and the relation in which it will stand to the Courts of Westminster Hall must depend upon the same rules with all other courts which are instituted and have particular powers given to them. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize are all liable to the controlling authority which the Courts at Westminster Hall have from time to time exercised for the purpose of preventing them exceeding the jurisdiction given to them'.[9] If this attitude were adhered to by the High Court at the present day, there would be little ground for complaint about the absence of civil control over courts martial. We have it here categorically stated by Lord Loughborough that the grounds for the issue of prerogative writs are the same in the case of courts martial as in the case of all inferior courts and he states without any qualifications that if a court martial exceeds its jurisdiction the High Court can interfere. Unfortunately it would appear from the recent case of *R.* v. *Secretary of State for War, ex parte Martyn*[10] that this is far from being the attitude of the High Court at the present day. Since 1792 the High Court seems to have been increasingly eager to decline 'controlling' jurisdiction, and, as stated by the learned editor of *The Solicitor,* the decision in *Martyn's Case* 'appears to go a little further in the abdication of civil control than any previous decision on this intricate problem'.[11] It is proposed, therefore, to consider the facts and judgment in *Martyn's Case,* to examine the principles enunciated therein, and to consider whether those principles are justified by judicial decisions reported since 1792.

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[6] *Loc. cit.*

[7] *The Solicitor* (1949) Vol. 16, p. 78.

[8] (1792) 2 H.Bl. 69.

In *Martyn's Case* the facts were as follows: On October 27, 1948, Martyn was brought before a court martial on a charge of desertion. He pleaded that he had never received his calling-up papers. There being no evidence on the other side, the court held that the applicant was not subject to military law because he had not enlisted as a soldier and decided that the plea in bar, which had been raised to their jurisdiction, was good. By rule 34 (3) of the Rules of Procedure, 1926, made under section 70 of the Army Act, 1881, it is provided that 'If the court allow the special plea, they shall record their decision and the reasons for it, and report it to the convening authority and adjourn; such a decision shall not require any confirmation, and the convening authority shall either forthwith convene another court for the trial of the accused, or order the accused to be released'. Another court was convened for the trial of the accused but not until more than a month had elapsed. Before this second court martial it was proved that Martyn's calling-up papers had been posted to him and according to the National Service (Armed Forces) Act, 1939, s. 18 and the decision of the High Court in *Lee* v. *Thomas*,[12] if papers have been sent to a man's last known place of abode he is deemed to be duly enlisted although he may never physically have received them. The second court martial, therefore, found that Martyn was a soldier and proceeded to find him guilty and sentenced him to nine months' imprisonment. Martyn applied to the High Court for an order of certiorari and a writ of habeas corpus on the ground that the second court martial had no jurisdiction to deal with him because it was not convened 'forthwith' in accordance with rule 34 (c) of the Rules of Procedure. The application was refused. Lord Goddard, L.C.J.,[13] said: 'Once it is conceded, as it has been in this case, that he was a soldier, a court martial had jurisdiction to try him. If the court martial in the present case has not observed the proper rule of procedure, that is a matter for the convening officer and, if necessary, the Judge Advocate General to deal with, but it is not a matter for this court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected. This application really amounts to asking us to decide that the members of the court martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this court has any jurisdiction'. These words, it may be noted, were repeated and confirmed by Lord Goddard only a week later in *R.* v. *O/C Depot Battalion, R.A.S.C. Colchester, ex parte Elliot*,[14] a case which will be considered presently. Now the meaning of the judgment in *Martyn's Case* is not, I suggest, readily apparent, but certainly Lord Goddard's view appears to be very different from that propounded by Lord Loughborough in 1792. It seems to me that there are three principles underlying the judgment in *Martyn's Case,* namely, (a) that the answer to the question whether or not a court martial has jurisdiction in any particular case can be arrived at simply by asking whether or not the accused was a soldier. If this is correct, then Lord Loughborough's words mean very little and Lord Loughborough certainly does not state that this is the position, (b) where the right infringed is one conferred by military law, then the High Court cannot interfere because it can only interfere where civil rights are infringed. No reference to such a proposition appears in Lord Loughborough's statement of the law and, furthermore, the interpretation of the expression 'civil rights' is not, I suggest, free from difficulty, (c) where there is a remedy provided by military law, for example, application to the Judge Advocate General, the High Court cannot interfere. Again, no hint of such a principle appears in *Grant* v. *Gould.* It is necessary, therefore, to examine the three principles in order to ascertain what judicial authority there is for them.

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[9] *Ibid.,* at p. 100.
[10] [1949] 1 All E.R. 242.
[11] *The Solicitor* (1949) Vol. 16, p. 26.

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[12] (1946) unreported.
[13] Humphreys, J., and Finnemore, J., concurring.
[14] [1949] 1 All E.R. 373.

(a) *The question of the jurisdiction of courts martial.* First, then, Lord Goddard states: 'Once it is conceded, as it has been in this case, that he was a soldier, a court martial had jurisdiction to try him'. As already pointed out, if this is so, then, even if the principle propounded by Lord Loughborough is correct, there will be very few cases in which the High Court can interfere. But this statement is in conflict with the general principles relating to questions of jurisdiction, and in direct conflict with many earlier decisions of the High Court concerning courts martial. In *Grant* v. *Gould* itself, Sergeants Adair and Bond, arguing against the application for prohibition, admitted that it was not disputed that martial law (*i.e.,* military law) could only be exercised in this country in so far as it was authorised by the Mutiny Act and Articles of War made under the Mutiny Act. As is the case with all persons and bodies who are given special powers by legislation, the jurisdiction of a court martial must depend upon the legislation conferring jurisdiction, that is, in the case of courts martial on the Army Act and Rules and Regulations made thereunder. A very cursory examination of the legislation relating to courts martial suffices to make it clear that the legislature have not simply said without qualification that courts martial have jurisdiction over soldiers. To give one example, by virtue of section 162 of the Army Act, 1881, a court martial would be acting without jurisdiction if it proceeded to try a soldier for an offence of which he had already been acquitted by a civil court. If, in fact, the answer to the question, 'Was the applicant a soldier?' does settle the question of jurisdiction, then many earlier cases concerning courts martial must have been wrongly decided. A case where a court martial was held to have no jurisdiction although the applicant was a soldier is *Ex parte Brown.*[15] In that case Brown moved for a writ of certiorari to bring up and quash the conviction of himself, Brown, by a district court martial at Chester, sentencing him to reduction to the ranks and a fine of £15. The basis of the application was that the district court martial had no jurisdiction to deal with him because he had already been summarily dealt with by his commanding officer, and section 46 (7) of the Army Act, 1881, provides that 'an offender shall not be liable to be tried by court martial for an offence which has been dealt with summarily by his commanding officer'. The Court of Queen's Bench (Pollock, B., and Hawkins, J.) found in favour of the applicant, Pollock, B., remarking that if a commanding officer had inadvertently or without full knowledge of the facts dealt summarily with a case, the offender could not be tried by a court martial for that offence. That jurisdiction depends upon all the provisions of the Army Act, and that that Act does not give unlimited jurisdiction over all soldiers in all circumstances and in all cases seems to need no further illustration.

It may possibly be argued that jurisdiction depends only on the Army Act and not on delegated legislation made thereunder, but this also seems to be contrary to principle. It is only necessary to consider cases concerning the Defence Regulations, for example, the well-known case of *Blackpool Corporation* v. *Locker*[16] and *Allingham* v. *Minister of Agriculture and Fisheries*[17] to illustrate the fallacy of such an argument. I have not been able to trace any case in which a court martial has been held to have no jurisdiction because of the infringement of a provision of delegated legislation made under the Army Act. But there are many cases where the ground of the application has been such an infringement, and the case has failed on other grounds without it being suggested by any one that the application must fail anyway because delegated legislation could not affect jurisdiction. So, as I have already pointed out, Sergeants Adair and Bond in *Grant* v. *Gould*[18] admitted that jurisdiction must depend upon all the provisions of the Mutiny Act and the Articles of War made thereunder. So in *Ex parte Roberts*,[19] a case to be considered in detail later in connection with the question of civil rights, Roberts contended that the court martial which tried him exceeded its jurisdiction by infringing a provision of the Articles of War made under the Army Act. It was not suggested at any time that the court martial had not exceeded its jurisdiction because the application alleged only an infringement of the Articles of War. The application failed on quite a different ground. Similarly in *R.* v. *Suddi,*[20] Suddi applied for a writ of habeas corpus on the ground that the court martial had exceeded its jurisdiction by infringing the 4th article of the 24th section of the Articles of War made under the Mutiny Act. His application failed because it was held that there had been no such infringement. But it is noteworthy that nobody suggested that even if the Article of War had been infringed the court martial would still have had jurisdiction.

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[15] (1892) 37 Sol.Jo. 27.
[16] [1948] 1 All E.R. 85.
[17] [1948] 1 All E.R. 780.

It seems reasonably clear then from the above cases that the jurisdiction of courts martial must depend upon all the provisions of the Army Act and delegated legislation made thereunder. Accordingly, I suggest that in *Martyn's Case* the High Court should have inquired whether or not the infringement of the rule of procedure concerned involved the court martial in an excess of jurisdiction. That question cannot be solved simply by saying 'he was a soldier and therefore the court martial had jurisdiction'. It does not, of course, necessarily follow that the breach of a procedural rule will always necessarily result in an excess of jurisdiction; that must depend upon whether the rule of procedure can be construed to mean that the court martial shall have no jurisdiction in the event of a breach of the rule.

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[18] (1792) 2 H.Bl. 69.
[19] *The Times* newspaper, June 11, 1879.
[20] (1801) 1 East. 306.

Rule 34 (c) of the Rules of Procedure, 1926, with which *Martyn's Case* was concerned, clearly states that the accused must be released unless the second court is convened forthwith and it would seem to follow from the wording of the rule that if the second court was not convened forthwith then the second court martial had no jurisdiction to try him because he should have been released.[21] This may be contrasted with the rule of procedure involved in the case of *R.* v. *O/C Depot Battalion, R.A.S.C. Colchester, ex parte Elliot*[22] where the court purported to act on the principle laid down in *Martyn's Case* and cited the words used in the case. The relevant facts of *Elliot's Case* for the present purpose are as follows:—

Elliot was detained in custody by the military authorities with a view to being brought for trial before a court martial. He applied for a writ of habeas corpus, one of the grounds of the application being oppressive delay in bringing him to trial. On behalf of the applicant it was pointed out that rules of procedure made under the Army Act specify the time within which prisoners are to be brought for trial by court martial and the time within which various reports are to be made to various authorities, and in the instant case these rules had been infringed. With respect to this point, Lord Goddard, L.C.J., said: 'Our attention was called, very properly, by counsel for the applicant to the various rules of procedure which have been made under the provisions of the Army Act relating to the time within which prisoners are to be brought for trial by court martial, the various reports which are to be made to the various authorities, and matters of that sort. In our opinion they have only this materiality, that in considering whether there has been gross and oppressive delay the court would naturally take into account the regulations which are laid down on the subject, but that is only one matter to be taken into account, and the mere fact that those regulations may not have been observed is not a matter for this court once it is shown that the man is subject to military law. Whether he may have a remedy or not merely because the eight, fifteen, or sixty-one day report, is not sent in, is not a matter with which this court can deal'. He then proceeded to quote the words which he had used in *Martyn's Case* to which reference has already been made. Now it seems to me that this case is very different from *Martyn's Case* despite the fact that in both cases rules of procedure made under the Army Act were infringed. In *Martyn's Case,* in my submission, it is possible to argue that the court martial had no jurisdiction to deal with Martyn unless the court was convened 'forthwith', because the rule provided that if the court martial was not convened forthwith the accused should be released.[23] In *Elliot's Case,* on the other hand, the infringement of the rules relating to the time for bringing to trial and the time for sending in various reports could not possibly affect the question of jurisdiction because the particular rules do not provide that the accused shall be released or detention shall be illegal if the rules are not observed. The Courts Martial Committee drew attention to this fact in dealing with the problem of delays before trial in their report. They recommended that it should be made illegal to retain an accused in close arrest for longer than ninety days without a court martial having been convened and having assembled.[24] There is accordingly, I would suggest, a fundamental difference between the facts of the two cases, and it conveys quite a false picture to say simply that the principle of *Martyn's Case* was applied in *Elliot's Case.* An interesting question is whether the court in *Elliot's Case* would have taken the same view if the rule of procedure infringed had, in fact, been in the terms recommended by the Courts-Martial Committee. From the words 'Once it is conceded . . . that he was a soldier, a court martial had jurisdiction to try him', it would appear that they would.

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[21] *Note:* Although no reference to this point is made in the report of Lord Goddard's judgment, it might, however, I suggest, be argued that the breach of a rule of procedure can rarely affect jurisdiction because of the wording of section 70 (2) of the Army Act which reads:—'Provided always that no such rules shall contain anything contrary to or inconsistent with the provisions of this Act'. It might be argued that if the jurisdiction conferred upon courts martial by the Army Act is further limited by the rules of procedure, the rules of procedure are void to that extent as being inconsistent with the Act. Note, further that rule 56 of the Rules of Procedure (also not referred to in the judgment) provides that 'Wherever it appears that a court martial had jurisdiction to try any person . . . the sentence . . . shall be valid, notwithstanding any deviation from the rules'. See, however, footnote 25, *infra.* There is, I suggest, room for much doubt and argument as to the exact effect of the provisions, but if these points had, in fact, been referred to in the judgment, there would at any rate have been less doubt as to the effect and meaning of the judgment.

[22] [1949] 1 All E.R. 373.

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[23] But see footnote 21.

[24] Cmd. 7608 [1949] at p. 17.

Further, it is to be observed that although in *Elliot's Case* His Lordship referred to the provisions as to time being embodied in rules made under the Army Act, some of the provisions are, in fact, embodied in the Act itself. It would surely, however, be ludicrous to state that if the recommendation of the Courts Martial Committee (that is, detention should be illegal if a court martial is not convened and assembled within ninety days) were embodied in a section of the Army Act, breach of it would involve an excess of jurisdiction, whereas if it were embodied in a rule of procedure made under the Act, jurisdiction would not be affected.[25] It seems quite clear, then, from an examination of the provisions of the Army Act and from a consideration of judicial authority that the question of the jurisdiction of courts martial cannot be settled by the answer to the question, 'Was the accused a soldier or not?' but must depend upon all the provisions of the Army Act and legislation made thereunder.

(b) *The question of civil rights.* Let us now turn to the principle that where the right is one conferred by military regulation or law, the civil courts cannot interfere because the only ground for their interference is an infringement of civil rights. We have already seen that no such limitation on the civil courts' right of interference was referred to by Lord Loughborough in *Grant* v. *Gould*[26] in 1792. The earliest case on the control of courts martial by the civil courts in which a distinction is made between civil rights and military rights is, so far as I have been able to ascertain, the case of *R.* v. *Mansergh,*[27] decided in 1861. The facts of this case were as follows:—

In January, 1858, Mansergh was a captain on duty with his regiment, Her Majesty's 6th Foot, then stationed at Calcutta. On February 19 he was gazetted to a majority in the 15th Foot, which was at that time stationed in England. Notice of the appointment was transmitted to India and notified by the Commander-in-Chief, Lord Clyde, in the general orders at headquarters and also in the regimental orders of the 6th Foot, after which notification, according to the customs and regulations of the Army, Mansergh ceased to belong to the 6th Foot. The 6th Foot was about to start on active service when a Colonel

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[25] This seems to be a clear case where a rule of procedure would affect jurisdiction even if the arguments put forward in footnote 21 are correct.

[26] (1792) H.Bl. 69.

[27] (1861) 1 B. & S. 400.

Barnes, who was in charge of the 6th Foot, informed Mansergh of his posting and required him to give up his company to another officer, which Mansergh did. Later Mansergh conceived the idea that his posting had been engineered by Colonel Barnes in order to prevent him going on active service and he wrote to Colonel Barnes expressing his views in no uncertain language. For this he was arrested, tried by court martial at Calcutta, found guilty, and sentenced to be dismissed from the Army. The sentence was confirmed by the Commander-in-Chief in India, Lord Clyde, and the proceedings of the court martial were sent to England and deposited with the Judge Advocate General. Three years later, Mansergh applied for a writ of certiorari to quash the proceedings on the ground that the court martial had no jurisdiction to try him because at the time of the offence he was not in the Indian Service but in the 15th Regiment of Foot, stationed in England, so that the Chief of the Indian Army, Lord Clyde, had no jurisdiction to convene a court martial to try him.

Such then were the facts of *Mansergh's Case*. The unanimous judgment of the court which consisted of Cockburn, C.J., and Wightman, Crompton and Blackburn, JJ., was that the application for certiorari must fail. It remains to examine the ground of the decision. Cockburn, C.J., delivered the first judgment, and the following words contain the reason for his refusing the application: 'Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this court ought to interfere to protect those civil rights, for example, where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort and the only matter involved was the military status of the applicant—a thing which depends entirely on the Crown, seeing that any person who enters into the military service engages to be entirely at the will and pleasure of the Sovereign'. He continued that there was in this case the additional factor that the proceedings of the court martial originated abroad in a place the tribunals of which are not subject to the jurisdiction of the Court of Queen's Bench, but that even assuming jurisdiction the application must still fail because only military status was affected. Wightman, J., who next delivered judgment, agreed with Cockburn, C.J., that independently of the fact that there was no jurisdiction to interfere with a court in India, certiorari would not lie because only the military status of the applicant was affected. He quoted the following observations of the court in *The Matter of Poe*[28]: 'If the writ were to issue at all, we see no court or individual to whom it could be addressed other than the King himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to His Majesty, when it is considered that this power is undoubtedly inherent in the Crown and might have been lawfully executed even without any court martial, it will at once appear manifest that no prohibition can lie in such a case. For what the King has power to do without any inquiry, he plainly may do, though the inquiry should not be satisfactory to a court of law, or even though the court which considered it had no legal jurisdiction to inquire'. The other two judges, Crompton and Blackburn, JJ., did not consider the distinction between an infringement of civil rights and a question of military status, but preferred to base their decision on the other point to which Cockburn, C.J. and Wightman, J., had adverted, namely, the fact that the Court of Queen's Bench had no jurisdiction over the proceedings of a court held abroad, and this is a matter which I propose to consider later in this paper.

Now in the judgments of Cockburn, C.J., and Wightman, J., we have the first reference to the principle that the civil court cannot interfere with a court martial, even though it has exceeded its jurisdiction or acted without jurisdiction, unless the applicant's civil rights are affected. Now it seems clear from the judgments that all that Cockburn, C.J., and Wightman, J., meant was that certiorari would not lie, notwithstanding the excess of jurisdiction, because all that had happened to the applicant was that he had been dismissed from the service, a thing which the King was entitled to do anyway even without court martial proceedings being taken. It would clearly be futile to issue certiorari to quash a sentence of dismissal from the army because of the court martial's lack of jurisdiction when the dismissal could have been effected even without court martial proceedings. It is a

[28] (1833) 5 B. & A. 681, 688.

well-established principle of law that members of the Armed Forces have no right not to be wrongfully dismissed: *Re Poe* (*supra*). In other words, the principle established is that even though a court martial acts without jurisdiction, the civil courts will not interfere if no right is infringed. An applicant for certiorari must prove both an excess of jurisdiction and the existence of a right which has been infringed. I would suggest that if this language had been used in *Mansergh's Case* much subsequent confusion could have been avoided. Unfortunately the judges, instead of stating that the applicant must prove the existence of a right, stated that the applicant must prove the existence of a *civil* right. All they mean is a right recognised by the civil courts, but it has resulted in the courts attempting to distinguish between civil rights and military rights, a distinction which is extremely difficult to establish. The true principle of the decision, then, is that, granted an excess of jurisdiction and the existence of a right recognised by law, the High Court will interfere whatever be the nature of right. However, the court in *Mansergh's Case* did use the expression 'civil right' instead of a right recognised by the law, and the principle that you must prove the infringement of a civil right has probably now become too well-established in the law to be eradicated. But if the principle is to be retained, then its meaning must be clearly understood and the courts should use the expression 'civil rights' in the same sense in all cases. I submit that in *Martyn's Case* the courts attached to the expression 'civil rights' a very different meaning from that attached to it in *Mansergh's Case*. To answer the question whether a civil right has been infringed, then, according to *Mansergh's Case* one must look at the sentence imposed. If it is a sentence involving loss of life, liberty or property, then a civil right is infringed because the civil law recognises and protects life, liberty and property, an infringement of those rights being illegal except in so far as it is permitted by the law, whether civil or military. If, on the other hand, the sentence does not involve the infringement of a right recognised by the civil law, then a civil right is not infringed, and it is a well-recognised rule of civil law that a member of the armed forces has no right not to be wrongfully dismissed. In *Martyn's Case* and *Elliot's Case* a 'civil right' in this sense was infringed, because the sentences inflicted in both those cases involved loss of liberty. However, in those cases the court seems to have been misled by the words used in *Mansergh's Case* and by later cases, to which reference is made below, into imagining that if the applicant in order to succeed has to allege the infringement of a military law or regulation then a civil right is not infringed. There are, according to *Mansergh's Case,* two distinct questions to be asked. (i) Did the court martial exceed its jurisdiction? This the court martial could only do by infringing a military law or regulation. (ii) If yes, was the sentence unlawful, that is did it involve infringement of a civil right? This will be so if the punishment involves infringement of a right recognised by the civil law. In *Martyn's Case* and *Elliot's Case,* however, the courts used the expression 'civil rights' in dealing with the first question, not the second. Thus in *Martyn's Case* it is said that because Martyn alleged the infringement of a military rule of procedure, therefore he was alleging the infringement of a military right, not a civil right, and therefore the civil court could not interfere. But it is impossible to allege that a court martial has exceeded its jurisdiction except by alleging an infringement of a military law or regulation, that is, a provision of the Army Act or delegated legislation made thereunder. If as soon as the applicant alleges an infringement of a military law or regulation the civil courts are to say that he is alleging the infringement of a military right, not a civil right, then there is no case in which the civil court will, in fact, interfere. Jurisdiction must depend upon military law and, even where the applicant alleges that the court martial had no jurisdiction over him because he was not subject to military law, he must refer to the Army Act to show that a court martial only has jurisdiction over persons subject to military law. Reference to civil rights would only have become relevant in *Martyn's Case* if the High Court had first decided that the court martial had exceeded its jurisdiction. It would then have been relevant to ask, 'Does the sentence involve infringement of a civil right, that is to say, a right recognised by civil law?' and the court must have decided that in this there was such an infringement, namely, imprisonment for nine months. Whether or not the court martial had jurisdiction to deal with the applicant is one question; whether or not any civil right was infringed by the sentence is another. The reference to civil rights in *Mansergh's*

Case is then, I submit, no authority for the view taken in *Martyn's Case* and *Elliot's Case*. However, that it was the starting-point of a progressive relaxation of control by civil courts is, I think, well recognised. This could perhaps have been avoided, as already pointed out, if the court in *Mansergh's Case* had differentiated between the infringement of a right and the infringement of *no right*, rather than between an infringement of a civil right and an infringement of military status. A subsequent case which followed the principle of *Mansergh's Case*, and perhaps helped in the development of the misconception of the meaning of the principle, is the case of *Ex parte Roberts*[29] decided in 1879. This case was an application by Roberts for a writ of certiorari to bring before the Court of Queen's Bench, with a view to quashing it, a sentence of a court martial by which in April, 1876, Roberts was dismissed the service. Roberts contended that the sentence was invalid because, contrary to the Articles of War made under the Army Act, it did not state the reason for the dismissal. The Lord Chief Justice pointed out to Mr. Waddy (Counsel for Roberts) that the proper course in such a case was to resort to the military authorities for redress, for the sentence (sentence be it noted) only affected the military status of the applicant which the court had held some few years ago was a matter of purely military cognisance. Counsel pointed out in reply that here the civil right to property was affected because Roberts would lose his right to a pension or retiring allowance and would lose the sum he had paid for purchase under the old system. The Lord Chief Justice replied that although in *Mansergh's Case* it was said that the principle there laid down did not apply where civil rights of life, liberty or property were affected, that did not apply to the rights referred to, which were purely military in their nature and dependent upon military status and military regulations. The Lord Chief Justice clearly meant that the sentence did not involve an infringement of a civil right, because the civil law did not recognise a soldier's right to a pension any more than it recognised his right not to be wrongfully dismissed. It is still the sentence, the punishment, which is being discussed in relation to the expression 'civil rights'. But the Lord Chief Justice's mode of expressing himself was perhaps unfortunate. His statement that the right to the pension was dependent upon a military regulation looks as if it might be largely responsible for the view now taken in *Martyn's Case* that there is no infringement of a civil right where you have to allege the infringement of a military regulation. But such an attitude is certainly not justified by the judgment in *Ex parte Roberts.* The Lord Chief Justice did not say that because the applicant's right to have the reason for dismissal stated in the sentence was conferred by military law, therefore no civil right was infringed. This was only relevant to the question whether the court martial had jurisdiction. He stated that the right infringed by the sentence was purely dependent upon military regulation and not recognised by the civil law. It is submitted again that this confusion could have been avoided by simply stating that a soldier had no legally recognised right to a pension and that, therefore, there would be no point in quashing the sentence.

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[29] *The Times* newspaper, June 11, 1879.

It seems reasonably clear that prior to *Martyn's Case* the principle was simply that a civil court would interfere with the decision of a court martial if the court martial lacked jurisdiction unless, in fact, the sentence did not involve infringement of a right recognised by the law. On the authority of *Martyn's Case* the principle seems to mean that the court will not interfere where the excess of jurisdiction arises from the infringement of a provision of military law, a proposition which would, as already pointed out, prevent the civil court ever interfering, even where the applicant was not a person subject to military law, because even in that case excess of jurisdiction arises from an infringement of a provision in the Army Act.

(c) *The question of an alternative remedy.* Let us now look at the third principle or idea which seems to underline the decisions in *Martyn's Case* and *Elliot's Case,* that is, the idea that where the military law itself provides a remedy, then the civil courts cannot exercise control. The principle, I would suggest, has arisen because of a failure to distinguish clearly between the right to issue prohibition, certiorari and habeas corpus on the one hand and the right to issue mandamus and to bring an action for damages on the other. The confusion is well illustrated by the case of *R.* v. *Army Council, ex parte Ravenscroft.*[30] The facts of this case were as follows: By regulation 124 made under section 70 of the Army Act it is provided that previous notice of the time and place of meeting of a military court of inquiry and of all adjournments of such a court shall be given to all persons concerned in the inquiry and that whenever an inquiry affects the character or military reputation of an officer full opportunity of being present throughout the inquiry shall be afforded to the officer. Ravenscroft complained that this regulation had not been complied with and that as a result of evidence given before the court of inquiry he had been ordered by the Army Council to revert to half pay. He applied to the Army Council, who refused to reopen the matter. He then obtained a rule *nisi* for a mandamus to the Army Council commanding them to cause the court of inquiry to reassemble to hear and determine his case according to law. *Held* by the Court of King's Bench—the rule must be discharged because (i) the court will not interfere in matters of military law prescribing rules for the guidance of officers; (ii) another and equally appropriate remedy was open to the officer under section 42 of the Army Act; (iii) the power of the Army Council to assemble a court of inquiry is a discretionary power and the Court will not order an authority to exercise a discretion in a particular way; and (iv) the remedy by mandamus would in the circumstances be ineffective.

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[30] [1917] 2 K.B. 504.

It is not disputed that this decision is perfectly correct and perfectly good law. But the judgments are, I submit, misleading in two respects: (i) their conclusion that mandamus will not lie where another remedy, equally efficacious, exists, is based, not upon the general rule to that effect laid down in numerous cases concerning mandamus, but upon decisions dealing with the right of a soldier to sue his superior officer for damages in a civil court, and (ii) it is consequently assumed that because mandamus will not lie and a remedy in tort is not available where another remedy exists, therefore prohibition, certiorari and habeas corpus will similarly not lie in such a case. Thus Viscount Reading, L.C.J., said in the instant case: 'There are regulations prescribed and means of seeking redress provided in cases of wrong inflicted by a superior upon a subordinate officer, and the essence of the acceptance of a commission in the Army is that the person makes himself amenable to military law and accepts the decision of the military authorities when charges of infringement of military law are brought before them. An authority for that is *Marks* v. *Frogley* (1898) 1 Q.B. 888. I agree that the actual decision in that case, like the decision in *Dawkins* v. *Lord Rokeby* (4 F. & F. 806), was not upon the particular question before us, but it contains passages upon the general law which serve to guide us in the present case. A. L. Smith, L.J., said at p. 899, "I find in the judgment of Lush, J., in *Dawkins* v. *Lord Poulet,* L.R. 5 Q.B. 94, 121, some remarks in connection with the Articles of War, of which this section (s. 43) is the equivalent, which appear to me to be such sound sense and good law that I will repeat them. He says, 'Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that specified in the Article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself, which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military to which he engaged to submit when he entered the service, entitled him to have. The same code creates both the right and the remedy and the Court cannot add to the one or to the other'"'. Ridley, J., similarly referred to *Marks* v. *Frogley* and *Dawkins* v. *Lord Rokeby* and also referred to *Keighley* v. *Bell.*[31] Avory, J., referred also to the case of *Sutton* v. *Johnstone.*[32] Now all these cases, *Marks* v. *Frogley, Dawkins* v. *Lord Rokeby, Keighley* v. *Bell* and *Sutton* v. *Johnstone,* are cases of actions for damages in tort brought by soldiers against superior officers. Now whether an action for damages will lie is a question for the law of tort. In accordance with the general principle of the law of tort it depends, as shown by the words cited from *Dawkins* v. *Lord Poulet,* upon the construction of the particular statute: 'Can it be reasonably inferred that any other mode or means of redress was intended by the Act than that specified in the article?' The question is whether such a right was intended to be conferred by the Act, and in construing the Act one of the points to be considered is whether the Act itself provides a remedy. If so, this militates against the probability of the legislature intending an action for damages for tort to be also available. Now it is true that there is also a rule that mandamus will not lie where another remedy is available, but the rule does not follow from the similar rule laid down in actions for breach of statutory duty or abuse of statutory power. It depends not upon the construction of the particular statute concerned, but upon the fact that as Bower, L.J., stated in *R.* v. *Commissioners of Inland Revenue Re Nathan*[33]: 'By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done'. You cannot, I suggest, properly cite cases on actions for tort when dealing with a case on mandamus.

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[31] (1866) 4 F. & F. 763.

[32] (1786) 1 T.R. 510.

The assumption that the principles applicable to actions by soldiers against superior officers for tort are applicable to applications for mandamus, has the further unfortunate effect that it leads to the assumption that the cases on actions for tort are also authorities on the question of the issue of prohibition, certiorari and habeas corpus. Thus in *R.* v. *Army Council, ex parte Ravenscroft,* Avory, J., said: 'In a matter affecting the discipline of the Army the court cannot interfere by mandamus, prohibition or certiorari at the suit of an officer or soldier with the proceedings of a military court of inquiry or with any action that may thereon be taken by the Army Council'. Similarly, the case of *Heddon* v. *Evans*[34] is frequently cited by writers as laying down the correct principles applicable to the issue of the prerogative writs and orders.[35] I have not cited this case because it concerned an action for damages by a soldier against his superior officer; and is therefore, I suggest, irrelevant to a consideration of the question of the control of court martial proceedings by prerogative writs and orders. The right to bring an action in tort must necessarily depend upon the construction of the statute. The construction of the statute is irrelevant to the problem of the issue of mandamus, prohibition, certiorari and habeas corpus, except in so far as the statute must be construed in order to ascertain whether there has been an excess of jurisdiction.

My conclusion then is that the principles of law propounded in *Martyn's Case* and repeated in *Elliot's Case* are contrary to

[33] (1884) 12 Q.B.D. 461, at p. 478.

[34] (1919) 35 T.L.R. 642.

[35] See, for example, Chalmers and Hood Phillips, *Constitutional Law* (6th ed.), p. 309.

earlier authorities and based upon a misconception of the decisions and that it is time for, and open to, the civil courts to return to the principle laid down by Lord Loughborough in *Grant* v. *Gould* subject only to the qualification laid down in *Mansergh's Case*, that is to say, for the civil courts to adopt the view that courts martial are liable to the controlling jurisdiction of the civil courts exercised by means of prohibition, certiorari, mandamus and habeas corpus if they exceed their jurisdiction, provided that the punishment involves the infringement of a right recognised by law.

There remain four further points which do not seem to require detailed examination but which do require to be shortly noted in order to complete the picture of the scope of prerogative writs and orders in relation to courts martial. First, as indicated by *Ravenscroft's Case* (*supra*), mandamus clearly will not issue simply because of an excess of jurisdiction and the infringement of a right recognised by law. The ordinary principles applicable to the issue of mandamus also apply so that the other usual conditions must be satisfied, for example, the duty broken must be owed to the applicant, another remedy must not be available, and so on.[36] Second, habeas corpus will issue even where jurisdiction is not exceeded if there has been gross oppressive delay in bringing the applicant to trial. There is an old authority for this—*Blake's Case*[37]—and it was recently confirmed by Lord Goddard, L.C.J., in *R.* v. *O/C Depot Battalion, R.A.S.C. Colchester, ex parte Elliot*[38] where he pointed out that in such case, however, the release under the habeas corpus would not prevent a court martial trial subsequently taking place but would merely be a form of release on bail until the court martial was ready to try the case. Third, if in fact courts martial are subject to the controlling authority of the civil courts to the same extent as all other inferior courts, as stated by Lord Loughborough in *Grant* v. *Gould*[39] then prohibition, certiorari and habeas corpus should lie where the principles of natural justice are infringed. However, so far as I have been able to ascertain, there is no decided case in which an application on such grounds has succeeded. It is, however, perhaps noteworthy, that in

[36] See Wade and Phillips, *Constitutional Law* (3rd ed.), pp. 278–280.
[37] (1814) 2 M. & S. 428.
[38] [1949] 1 All E.R. 373.
[39] (1792) 2 H.Bl. 69.

Grant v. *Gould* the application of the principles of natural justice seems to be impliedly recognised. Thus, two of the grounds of the application for prohibition in that case were that the court martial had admitted evidence inadmissible in a common law court, and rejected evidence admissible in a common law court, and that Grant was not charged with the offence of which he was convicted. It was held that the common law rules of evidence were inapplicable and further held that the sentence did correspond with the charge. But this seems to impliedly admit the application of the rule of natural justices. However, if the view adopted in *Martyn's Case* is to be applied in the future, then there seems little chance of a court martial conviction ever being upset on the grounds of infringement of a principle of natural justice. The fourth matter which must shortly be mentioned is this. It will be recalled that in *Mansergh's Case* one of the points made was that the civil courts in this country had no jurisdiction over the proceedings of courts abroad. If, in fact, this is the true position, then it is, of course, a serious obstacle to effective control of courts martial by the civil courts. The point was discussed *obiter* this year in the case of *R.* v. *Secretary of State for War, ex parte Price,*[40] where the Court of King's Bench expressed the opinion that the point was still open. They further drew attention to the fact that the circumstances of *Mansergh's Case* were that there were at that time civil courts sitting in India to which Mansergh could apply, and that the position might well be different in a case where there are no civil courts to which to apply in a country in which a British subject is tried before British subjects under a British Act of Parliament. It is to be hoped that if the question does come directly before the court they will decide in favour of their own jurisdiction.

II—RESTRICTION OF JURISDICTION OF COURTS MARTIAL

So much then for the problem of the civil control of court martial proceedings. It is clear that the present attitude of the courts, whether justified by authority or not, is in favour of an abdication of controlling authority. There is, accordingly, I suggest, a strong case for the further reform which I suggested at the outset of this article, that is to say, limiting the jurisdiction of courts martial to military offences. It seems quite clear that the only justification for the existence of courts martial is the necessity for maintaining discipline in the armed forces and the difficulty of obtaining a civil trial where an offence occurs in remote places. I would accordingly suggest that the jurisdiction of courts martial should be statutorily confined to offences against discipline and that all jurisdiction over civil offences should be taken away except where it is reasonably impracticable to arrange for a civil trial. The meaning of 'reasonable impracticability' would, of course, have to be defined by statute by reference to, *inter alia,* such matters as distance from a competent civil court.

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[40] [1949] 1 K.B. 1.

III—PRECISE DEFINITION OF OFFENCES AGAINST MILITARY LAW

Finally, it is, I think, undoubted that some military offences, that is offences against discipline, are so wide that they can be made to cover practically any form of act or omission. The Courts Martial Committee considered the offence of mutiny and recommended that 'an attempt should be made to define the offence of mutiny. In the light of present-day conditions it is capable of too wide an interpretation'.[41] It is regrettable that they did not at the same time draw attention to the offence created by section 40 of the Army Act, that is, 'conduct prejudicial to good order and military discipline'. There is surely a strong case for the repeal of this notoriously vague section. Surely if conduct is truly prejudicial to good order and military discipline it should be possible to prove one of the many specific offences existing under military law.

CONCLUSION

If the three steps suggested above were taken, namely, an extension in the control exercised by civil courts over courts martial by a return to the earlier attitude of the civil courts; a diminution of the jurisdiction of courts martial; and a more precise definition of the scope of military offences; then, I suggest, many of the defects in the court martial system would disappear. These reforms, coupled with the reforms suggested by the Courts Martial Committee, would, it is suggested, leave little ground for complaint about the injustice of the courts martial system.

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[41] Cmd. 7608 [1949] p. 29, para. 133 (v).

12

BRITISH PUBLIC LAW AND THE CIVIL LAW IN MALTA

J. M. Ganado

It is said that Maltese law has succeeded in making a happy union between British public law and its own private law, which belongs to the legal system derived from the Roman or the civil law. Even a cursory examination of the Maltese Civil Code reveals its close connection with the Code Napoleon, with the Italian Code and with other codes of Southern European nations. The combination of these two laws has been a feature in Maltese affairs for the last 140 years. In this paper I shall try to throw some light on the manner in which this 'union' has worked in practice. As you will expect, some difficulties have now and again been experienced, but on the whole it has been possible to keep the parties to this union on good terms.

The law of every nation is the resultant of the social, economic and political vicissitudes of a people and the title of this lecture, 'British public law and the civil law in Malta', describes in a nutshell the main trend in the evolution of Maltese legal history. On the one hand, the strong links which Malta has had with the European Continent for many centuries have resulted in the retention of the Roman civil law system; and, on the other hand, the British Administration since 1814 has introduced principles of British public law.[1]

The case of Malta can be instanced as illustrating two things: *firstly,* the great difficulty of making a nation change its own private law; *secondly,* the possibility of having a perfectly compatible public law system of foreign origin.

The first point hardly needs elaboration. It is enough to say that the Maltese Insurgent Government in 1802, notwithstanding the turmoil ensuing upon the surrender of the French Forces took care to insist upon a promise from the British Crown that the then existing legislative body and the code of laws should be respected. Later an attempt to put aside *in parte* the continental codes in favour of the common law provoked such a stiff opposition from the Maltese judges that His Majesty's Government, to avoid further trouble, took the deplorable step of dismissing the English Chief Justice from office. The dismissal was, of course, possible because a mistake had been made in drawing up the Chief Justice's appointment. Instead of stating that he was being appointed *quamdiu se bene gesserit,* as all his brother-judges were, it was stated by mistake that he was being appointed 'during the King's pleasure'.[2]

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[1] In this paper details about the influence of the Romanistic tradition and about the evolution of the civil law in the Maltese Islands are not being included. On these points reference may be made to the following two articles by the present writer: 'Maltese Law', *Journal of Comparative Legislation and International Law* (1947), p. 32 *et seq.*, and 'Biography of Sir Adrian Dingli', *The Law Journal* (*Malta*), Vol. 1, Part 2, p. 9 *et seq.*

The main direct imposition by the Imperial Government concerned maritime law, because it was held that it was in the general interests of the Empire that all its members should conform to the same pattern of legislation in maritime trade. When the draft Commercial Code was presented in 1853 it was quite clear that the French Code had been followed. The Secretary of State disapproved the second book of the Code which referred to maritime matters on the ground which I have just mentioned. The first, third and fourth books were enacted in 1857 while several ordinances on maritime law were promulgated in 1858. These ordinances were in harmony with British principles and they were therefore acceptable to the Secretary of State. Really, the change did not entail too wide a departure from the laws hitherto prevailing by reason of the quasi-international nature of the origin of maritime law.

The second point, that is the possibility of having a perfectly compatible public law system of foreign origin, leads us straight into our subject.

I am dividing this paper into two distinct parts. After performing the preliminary task of explaining in general what is here meant by the conveniently vague phrase 'British public law', we shall see in what way and in what sense British public law was introduced in Malta. The second part is certainly more important, because in it we shall have a glimpse of the collaboration between British public law and the civil law system and of the nature of the conflicts that have been experienced. It is said that British public law is built upon private individual rights,[3] and, in this way, it shares a common basis with the private law system itself; it is, therefore, natural that one should put oneself the question: does it really matter if that system is the English one or a foreign one?

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[2] See the present writer's *Biography of Sir Ignazio Gavino Bonavita, The Law Journal (Malta)*, Vol. 1, Part 5, p. 24 *et seq.*

What does 'British public law' mean? Sir Frederick Pollock's essay on the 'Contacts between Public and Private Law'[4] makes it sufficiently clear that the phrase 'public law' can be interpreted in more than one way. At the beginning of his essay he cites an extract from the *Digest*, D. 1.1.1.2: *'Publicum ius est quod ad statum rei Romanae spectat'*, and he considers that definition as being the best one we have had.

No definition can really suit our purposes. To understand what 'British public law' with reference to Malta means, one must look at the main points in connection with which modifications were introduced as a result of the British domination. Thus British public law is being understood as including:

(1) The basic principles of the Constitution establishing on a legal footing the relation between the governed and the governing body harmonising social stability with individual freedom.
(2) The organisation of the courts, judicial independence and equality of opportunity for all in the administration of justice and the system of punishments.
(3) The freedom of worship and the freedom of the press.
(4) The regulation of trade disputes and the organisation of trade unions and bodies of a similar nature.

These are really the main items of public law which have been insisted upon by the British administration. Of course, I am referring only to the fundamental tenets, for there are divergences in points of detail. For instance, it does not matter what the number of jurymen in a criminal trial is, or whether they come from both sexes or not, but it does matter a great deal if the jurymen are selected by Government officials for particular cases or from one political party or if jurymen are allowed to declare their views in open court even before the actual trial has started.

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[3] See Sir Frederick Pollock, 1 *Cambridge Law Journal*, 1922, p. 256; and Professor Jolowicz, 22 *Tulane Law Review*, 1947, p. 78.

[4] 1 *Cambridge Law Journal*, 1922, p. 256.

We shall now look back to the early days of British administration in which the foundations were laid in order to see in what way and in what sense British public law was introduced.

After the expulsion of Napoleon's forces from the island, the Maltese National Congress emanated on June 15, 1802, a Declaration of Rights in which *inter alia* the legislative power and the authority to impose taxation were reserved to the so-called *'Consiglio Popolare'* (Popular Council). The final article of this declaration runs as follows: 'No man shall have any personal authority over the life, the property or the liberty of his fellow-citizen. Authority resides solely in the law and any restraint or punishment can only be exercised subject to the law'.

No critic, I think, can deny that this doctrine of the Insurgent Government of Malta is nothing less than the Doctrine of the Rule of Law. I feel that that doctrine was the natural outcome of a reaction against an authoritarian form of Government, like that of the Order of St. John. The Declaration of Rights was a unilateral document meant to qualify Malta's entry into the British Empire and thus the Rule of Law was the mainstay of Malta's voluntary assumption of membership within the British Commonwealth of Nations.

It seems that the British Government regarded the introduction of British public law as one of the duties it had assumed.[5] Lord Glenelg, for instance, pronounced the following words in the House of Lords (April 30, 1839): 'The Maltese people by their own act and authority voluntarily assented to the protection of Great Britain. In that light, the rights and privileges of Malta had ever since been regarded, and it was peculiarly the duty of Great Britain to take care that the principles of British freedom and the full benefit of British legislation should be brought into operation in that, even above all the Dependencies of the British Crown'.

The Doctrine of the Rule of Law was echoed twelve years later in a speech delivered by Sir Thomas Maitland, the then Governor of Malta, on January 2nd, 1815. 'British rule',

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[5] See G. Schwarzenberger, 'Human Rights in British State Practice', *Current Legal Problems* (1948), Vol. 1, p. 166 on British policy in general in Colonial Administration.

Sir Thomas said, 'is of a nature equally binding upon all; I am limited and restrained in my authority, the judges are limited and restrained in theirs; the law of the land is the only fixed and invariable point to which they are to look. The King's intention', he went on, 'is to secure to the Maltese in the fullest manner the free exercise of their religion, to maintain the Ecclesiastical Establishment, to introduce such ameliorations in the proceedings of the courts of law as would secure to every one the certainty of speedy and effective justice and to make such improvements in the laws themselves as past experience or change of circumstances might render necessary or advisable'.

In the same speech the Governor explained that the separation of the three powers of the State—the executive, the legislative and the judicial—was 'the great principle upon which it is the intention of His Majesty that the Government of these Islands shall be conducted. Each should be independent of the other and that, while on the one hand, the judicial authority should be restrained in the closest manner from interfering with the legislative or the executive, so on the other the executive authority should be prevented from any undue interference with judicial proceedings'. I should certainly not advise any student to consult Sir Thomas Maitland for a fair explanation of the Doctrine of the Separation of Powers. You will note that while the judicial authorities 'should be restrained in the closest manner' from interfering with the other Powers, the executive authority 'should be prevented from any *undue* interference with judicial proceedings'.

After this memorable speech the Governor proceeded to concentrate the three powers of the State upon himself; he was the sole executive and legislative authority in the land and, besides, he assumed important judicial functions by becoming chairman of the Supreme Council of Justice which was the Supreme Court of Appeal.[6]

The principle of absolute freedom in the practice of one's religion was declared by an official notice of October 5, 1813. The right of public meeting was subsequently recognised but no freedom was allowed to the press until 1839 when the Royal Commissioners John Austin and George Cornewall Lewis proposed a draft Bill on press law which was modified in 1889, and which served as a basis for further legislation.

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[6] See A. V. Laferla, *British Malta* (*Malta*), 1938, p. 105; P. De Bono, *Storia della Legislazione in Malta* (*Malta*) (1897), p. 279 *et seq.*

The courts of justice were reorganised. The judges were given fixed salaries and, contrary to the system prevailing under the Knights of St. John, they were not allowed to receive any fees from contending parties. Their appointment lasted *quamdiu se bene gesserint.* The Governor, as such, could not interfere with the administration of justice. He only retained the prerogative of mercy and renounced all the discretionary powers which had pertained to the Grand Master of the Order of St. John. These powers were in part conferred upon the Second Hall of the Civil Court, which is the Court, so-called, of Voluntary Jurisdiction and in part upon the ordinary civil court upon normal proceedings being taken and therefore they ceased to be discretionary.

The system of punishments was also varied; but the most notable change was that all forms of torture were abolished. It is true that torture had been a dead letter for some time already but it was still a recognised form of punishment in exceptional cases under the Code de Rohan of 1874.

In criminal proceedings the jury system was introduced and as finally developed there are nine jurymen: one chosen by ballot from the list of foremen and eight from the list of ordinary jurymen. They need not return a unanimous verdict, but there must at least be a majority of six votes against three. When the verdict returned is not unanimous the judge's discretion in the infliction of punishment may become wider. For example, if a unanimous verdict for murder is returned the only penalty applicable is capital punishment, but on a majority verdict the judge need not apply it and in fact never applies it.

The introduction of the jury system was firmly opposed by the leading Maltese lawyers. The local attitude seems to have been that the jury system can be useful only in trials of a political nature.[7] Local opinion has, however, completely changed. During the last siege of Malta the jury system was discontinued both on account of the increased incidence in crime and principally on account of the continuous interruption of trials during air attacks. When the siege was lifted the press started clamouring for the return of the jury system, for it was said that that system formed part of the 'Maltese national heritage'.

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[7] See *Law Journal, l.c.*, p. 28. This opinion can only mean that jurymen should follow their own convictions when they see that a prosecution for a political crime is unjust, though legally tenable. It is quite clear that this contention cannot in theory be supported though it may, perhaps, possess a deep practical insight into the conduct of political trials.

The procedure in criminal trials aims at ensuring absolute equality between prosecution and defence. The presumption of innocence of the accused is the corner-stone of the whole edifice and the rules of evidence aim at excluding all evidence which might prove dangerous from the point of view of the administration of justice. I need not elaborate these points for the Maltese system shares with its prototype its merits and demerits.

Trade unions in Malta are of quite recent birth. The Ordinances and Acts concerning them[8] are based to a great extent on the pattern set out by the English Acts. On these matters, therefore, English judgments and textbooks are accepted as authoritative.

The introduction of British public law on all these points found no obstacle in the fact that the private law of Malta formed part of the civil law group. Roman private law was built up on an individualistic basis and it may perhaps be looked upon with disfavour under a collectivist régime but not otherwise.[9]

Now we come to the question of interpretation and application. Has British public law been interpreted and applied in the same way in which it would have been interpreted and applied here? This is the difficulty of interpretation which invariably arises whenever some form of international uniformity in law is aimed at. It is, for instance, one of the greatest problems in conflict of laws, for even if two or more States have uniform conflict rules, can one ever be sure that the interpretation of them will be identical?

To start with there are serious disagreements on the norms regulating interpretation itself. For instance, constant reference is made by Maltese judges to parliamentary debates, and what is said in Parliament in regard to the interpretation of laws is given considerable weight. This practice was the object of comment by the Judicial Committee of the Privy Council in the case *Strickland* v. *Mifsud Bonnici*.[10] 'As regards the reports of debates, it is clear, in their Lordships' opinion, that they can only be evidence of what was stated by the speakers in the Legislative Assembly'; however, their Lordships, very rightly, observed that what is said in Parliament cannot be taken to be a proof of a fact. I do not think that there is any chance of that statement ever being contradicted.

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[8] Act 17 of 1927; Acts 21 and 22 of 1929; Ordinance 21 and 22 of 1937; Proclamation 24 of 1937; Ordinance 4 of 1945; Ordinance 29 of 1946; Ordinance 21 of 1947.

[9] See article by Professor H. F. Jolowicz, 'Political implications of Roman Law', *Tulane Law Review,* Vol. 22, 1947.

In general, it must be said that the Maltese courts have followed English case law on questions concerning the items of public law which have been mentioned already; but the civil law background in the judges' education occasionally makes itself felt under one of three forms. There can be:

(1) A sharp contrast in the judicial attitude towards certain questions. We are, of course, enabled to see the contrast more clearly when there is an appeal to the Judicial Committee.

(2) The evolution of theories which have no place in British public law.

(3) The interpretation of English Acts in a way conflicting with their interpretation in England—on the ground of Maltese public policy.

I

On the first type of conflict the case *Sammut* v. *Strickland*[11] will be examined briefly. I am sure that that case is quite well known to students of constitutional law.

The facts were as follows: in 1936 the 1921 Constitution granting self-government to Malta was revoked by Letters Patent of August 12, 1936, in virtue of the powers granted to His Majesty the King by Act of Parliament,[12] namely, the right to 'amend' and 'revoke' the constitution. After the revocation the office of Governor was constituted and the Governor proceeded to impose certain forms of taxation which the plaintiff Lord Strickland paid under protest. He then sought to recover the amount paid on the basis of the law's invalidity. He contended that the Crown had never possessed the power to legislate by Order in Council, and that, even if his first contention were incorrect, the Crown had lost that power once and for all when self-government was granted in 1921. Furthermore, that power did not automatically revert to it upon the revocation of the Constitution in 1936.

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[10] Decided on October 29, 1934 (Appeal No. 29 of 1933).

[11] [1938] A.C. 678.

[12] Malta Letters Patent Act, 1936.

The claim was dismissed by the judge of first instance and by the Judicial Committee, while it was allowed by the Court of Appeal.[13]

The power to legislate by Order in Council was closely linked with the origin of British sovereignty over Malta. On this point the Court of Appeal had based its judgment on the Roman law doctrine of '*Consuetudo*' and prescription, while Lord Maugham in his judgment remarked that Roman law had nothing to do with the matter. The difference in approach was really typical.

The argument elaborated by their Lordships in Malta was substantially as follows: the question refers to the validity of the British title to Malta, for it is only on that title that the King's right can rest; therefore British constitutional law can come in only when a valid title is grounded. On the point of title the only law that could be applied was the *lex communis,* and the nature of the title thus ascertained must be carried to all its logical consequences.

During the whole case one sees that there was this doubt continually arising: which law is to govern the case? In page 7 of the short-hand report of the case one of the appeal judges is reported to have put the following question: 'There is another point', he said, 'which laws are to govern this question: the Maltese law or the common law of England?' Lord Strickland replied, 'Very easy, my Lord. The Roman law is no doubt our common law'. The same point arose several times over during the hearing and finally, when the Senior Crown Counsel submitted that 'the contention on this side is that the principles of the civil law have nothing to do in this case, but we have to be guided solely by principles of constitutional law', one of the judges intervened and added, 'That is to say, constitutional law and the civil law on general principles'.

The Court of Appeal in its learned judgment, reviewed the details concerning Malta's entry into the British Empire. Upon the defeat of the French forces by the Maltese insurgents aided by the British army and the Allied navies, sovereignty over the island returned to its former sovereign prior to the French occupation, namely the King of the two Sicilies.[14] In point of fact, however, the Maltese people were strongly opposed to the return of the Order of St. John or to being governed by the King of the two Sicilies. Their sole desire was to become members of the British Empire, and this was finally granted by the declaration issued on October 5, 1813. A memorial tablet was erected in 1814 bearing the words, '*Magnae et Invictae Britanniae Melitensium Amor et Europae Vox has Insulas confirmat* A.D. *1814*'.

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[13] Vol. 30, I.I. 75.

Mr. Joseph Chamberlain in a speech at the Governor's palace, Valletta, on June 19, 1900, said: 'Malta is in a unique position. It has not come down to us in the ordinary way in which the possessions of the Crown have been acquired. She is not ours by right of the first discoverer, nor is she ours by right of conquest. Her independence which was threatened by the great Napoleon was maintained largely by the action of the Maltese themselves; and it is due, I think, to their clear perception of their position in the world that they were led, of their own accord, to offer their patrimony to the British Goverment and came under the protection of the British Empire'.

Their Lordships, therefore, thought that Malta's case did not fall under any of the recognised titles; there was no settlement, no conquest, no ordinary cession. The notion of a 'cession' implied the existence of two parties, and one of the contracting parties must have possessed sovereignty which it could cede to the other. In this case under examination there was merely an arrangement between the population and the Crown, which did not produce at law the Crown's right to legislate by Order in Council. But for a century and a half the Crown did legislate by Order in Council and no one had ever made any opposition. The Court, consequently, applied the doctrine of '*Consuetudo*'. 'The uniformity of usage', it said, 'had as its natural and legal effect that of bestowing on His Majesty a right of legislating in the manner aforementioned. That usage according to the principles of Roman law . . . possesses the required conditions for its validity: it was uniform, public, observed by the people, spread over a long space of time and implicitly accepted by the legislature . . .'.

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[14] See letter of Governor Sir Thomas Maitland to the Secretary of State of April 13, 1814, referring to certain instructions sent to the British Minister in Palermo and the Dispatch of the Colonial Secretary of August 15, 1814.

In 1921 upon the grant of self-government, this right had been renounced. In 1936, the Constitution was revoked. Could it be said that the right to legislate by Order in Council had been automatically revived? Their Lordships mentioned Lord Mansfield's words in *Campbell* v. *Hall*.[15] Lord Mansfield had said that the grant of self-government had '*immediately* and *irrecoverably*' brought to an end the King's right to legislate by Order in Council. The word 'irrecoverably'[16] could only have one meaning, namely that the right to legislate had to be regranted by Act of Parliament, which, their Lordships thought, was not done in this case. But, besides this, there was another point. The King's right had arisen on account of '*Consuetudo*' or long usage for over a century: therefore, their Lordships held that out of its very nature it could not revive *ex abrupto*.

The natural conclusion of all this was that the law which the Governor had enacted was declared to be *ultra vires*.

The Judicial Committee in an elaborate judgment by Lord Maugham excluded the relevance of Roman law, and held that the question was to be regulated exclusively by British constitutional law. Furthermore, the case of Malta had to fall under one of the recognised headings of acquisition of colonies and one could think, by analogy, of title by 'cession'. That title by British constitutional law carried with it the Crown's right to legislate by Order in Council.[17]

Lord Maugham, then, very rightly distinguished this case from *Campbell* v. *Hall*. In the latter case the King had levied a tax in Grenada at a time when the local Parliament was functioning. In Malta, on the contrary, the Constitution had already been revoked. The *ratio decidendi* of *Campbell* v. *Hall* was obviously inapplicable to *Sammut* v. *Strickland*.

But, here again, we come across a divergence in the method of interpretation. In Malta precedents are not binding; they possess only persuasive authority. Thus, whatever a judge may say, can always be described as an *obiter,* in the sense that it is never binding. The *ratio decidendi* does not figure as a different concept. No doubt, the cases were different, but Lord Mansfield did use the word 'irrecoverably'; that, of course, meant that the King could not recover his right. The phrase had been adopted by the Court of Appeal.

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[15] 1 Cowp. 204.

[16] Before the Court of Appeal, Lord Mansfield was cited as having said 'irrevocably' instead of 'irrecoverably'. I do not think that the mistake made any substantial difference. See Chalmers and Hood Phillips, *Constitutional Law* (6th ed.), p. 542, where Lord Mansfield is said to have used the word 'irrevocably'.

[17] See Chalmers and Hood Phillips, *op. cit.*, p. 540 *et seq.*

I hope that this case gives quite a fair illustration of the first type of conflict I have mentioned. We have seen the great difference in the approach to the questions which were involved. Those questions had been mooted already for over a century; and it seems that the main tendency in Malta was that another title which was called 'compact' should be recognised. In the words of Sir John Stoddart, who was Chief Justice of Malta: 'I confess, my Lord, that as a constitutional English lawyer, I am most disposed to rest His Majesty's Sovereignty, whenever it can be done consistently with truth and legal principle, on the ground of compact. The voluntary choice of a free people seems to me to afford their ruler a more secure as well as a more honourable title'. This doctrine, however, has been rejected by the Judicial Committee, by holding that the case of Malta must be regarded as a case of 'cession'.

I hope that no occasion will arise for this question to be discussed again; but, if the case does arise, one must doubt whether a Maltese court will be prepared to accept the implications which the ultimate decision in *Sammut* v. *Strickland* carries with it. In particular, I am bearing in mind the wide powers which acquisition by ordinary cession confers upon the Crown. The Judicial Committee's decision accepts the principle that 'a colony is for the purposes of constitutional law ceded when it is handed over by the consent of its people and leaders . . . *and can be regulated at the absolute discretion of the Crown, which may, as in the case of Malta in 1813, disregard the former rights of the people and impose on them a purely autocratic rule'.*[18]

The cause of this type of conflict is quite obvious. In Malta side by side we have British public law surrounded by the civil law; generally they keep apart, but occasionally a case comes along when they remind us that they are *both* there.

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[18] *Ridges' Constitutional Law* (7th ed., 1939), by A. Berriedale Keith, p. 531.

II

Let us now pass to the second type of conflict, that is when new theories of public law are evolved and to illustrate it I have chosen the doctrine of governmental responsibility.

English law in 1813 was that the Crown was not liable in tort in any case and in contract it could not be sued except upon a favourable answer to a petition of right; and over and above this field of law there was the Doctrine of the Act of State.[19] It seems that from the early days of British domination no notice was ever taken of these doctrines in Malta and in 1935 the Court of Appeal suddenly realised that while British public law was in full vigour, questions relating to governmental responsibility were regulated by principles conflicting with English law. In *Cassar Desain* v. *Forbes,*[20] it said that the position was anomalous and attempted a reconciliation. This reconciliation, however, was short-lived, for the Court of Appeal, differently constituted, has reverted in the case *Buttigieg* v. *Cross*[21] to the doctrine previously held. The point today, admittedly, is an open one, but it seems probable that the prevailing theory will be followed.

Briefly the position is as follows: as early as 1815, legislation in Malta recognised by implication the jurisdiction of the ordinary courts to take cognizance of cases to which the Crown was a party.[22] The question then had to be decided whether the State could be sued for damages with respect to all acts. In 1894 Baron Chapelle, summarising previous practice and basing himself on Italian case law, explained a doctrine which is still accepted today (see *Busuttil* v. *La Primaudaye*[23]). The State, he said, has a dual personality: it can act in its political capacity *qua* State and, besides, it can enter into private law relations as much as any individual. When the act is performed in its former capacity, *iure imperii,* the courts are not competent to investigate the merits of the act and they have to limit themselves to the factors bearing on the act's validity from the point of view of form and capacity. On the other hand, when the State acts *iure gestionis* it must be treated on the same level with ordinary citizens, for the law makes no distinction.

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[19] *Ridges' Constitutional Law* (7th ed., 1939), by A. Berriedale Keith, p. 33 *et seq.*

[20] January 7, 1935, Vol. 29, 1, 43.

[21] Decided by His Majesty's Court of Appeal on November 8, 1943, and that judgment was confirmed by the Judicial Committee of the Privy Council on October 10, 1946.

[22] See Ordinance No. 1 of 1815 and section 33 of the Code of Civil Procedure.

[23] Judgment by His Majesty's Civil Court on February 15, 1894 and by His Majesty's Court of Appeal on March 28, 1894 (Vol. 14, pp. 94 and 301).

This theory immediately found favour with the courts and is still operative today.[24]

The Crown is not liable for damages whenever it acts in its political capacity. For instance in *Green* v. *Makedonsky*[25] the Secretary of State had ordered the removal from Malta of two Russian women; thereupon one of their creditors obtained a warrant of impediment of departure against the two women, but the court ultimately revoked the warrant on the ground that it had no authority to suspend the execution of the Secretary of State's order. Similarly in *Amato* v. *Merewether*[26] the Court of Appeal held that it could not enter into the technical merits of the detention of a person in a hospital for mental diseases. In *Azzopardi* v. *Malfiggiani*[27] the Commercial Court held that the Government could not be liable for damages for having stopped certain theatre performances for reasons of morality.

It is interesting to note that this distinction between acts *iure imperii* and acts *iure gestionis* or *iure administrationis* has been explained by H.M.'s Civil Court on the basis of the Doctrine of the Separation of Powers. In *Moran* v. *Micallef nomine*[28] the court stated: 'The basis of that distinction is the principle of the independence of the executive and the judiciary, which principle was formally proclaimed in Malta as far back as the year 1815'.

On the other hand, whenever the State enters into ordinary private transactions, for example, a contract of lease, normal principles of responsibility will be applied.

The two legal persons of which the State, according to this theory, is formed are totally distinct one from the other. I think that this complete independence can be rather dangerous. What the State in its civil capacity does can be undone by the State in its political capacity; and in this manner, a powerful administration has at its disposal a very dangerous means of evading contracts. An example will show how this principle works. In *Buttigieg* v. *Cross*[29] the plaintiff had been asked by the military authorities to open a club in Valletta for use by officers. The plaintiff provided the money and labour for the necessary repairs and the club was run by a committee of military people. After some time it seems that on account of inefficient administration, the club became objectionable and the military authorities disallowed all officers from frequenting the club. The plaintiff sued for damages, among others, the brigadier in charge of administration in his official capacity. The Civil Court condemned the Military Authorities to pay damages on the ground that they had fallen short of the required standards of good faith; but that judgment was reversed on appeal both by the Court of Appeal and the Judicial Committee. The Court of Appeal stated explicitly that a contract or quasi-contract could not impede the Crown from taking all the measures that might be necessary to safeguard the morality of the places frequented by members of the forces. The act forbidding officers from going to the club was issued *iure imperii* and no direct or indirect sanction could be imposed by the court. The fact that previously there had been a contract *iure gestionis* (or *iure administrationis*) could not be put in bar.[30]

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[24] See *Strickland* v. *Galea*, January 9, 1935, Vol. 29, 2, 215.
[25] November 28, 1921, Vol. 24, 2, 706.
[26] March 11, 1903, Vol. 18, 1, 87.
[27] January 5, 1902, Vol. 18, 3, 69.
[28] Vol. 29, 2, 1085.

The following extract from the Court of Appeal's judgment stated quite clearly the principle on which the judgment was based:

> 'Supposing that it had been sufficiently proven that there had been an explicit agreement between the military authorities and the plaintiff to keep the club open throughout the war, and that the military authorities had so stipulated with the plaintiff, it was obvious that the brigadier or other authority had acted *iure administrationis* in order to ensure that officers should have a club to go to when on leave. But the military authorities could never have renounced the rights which appertain to them *iure imperii*. It is a settled principle, and it has been constantly held by this court, that these two functions of the civil or military

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[29] Judgment by His Majesty's Court of Appeal of November 8, 1943; confirmed by the Judicial Committee of the Privy Council on October 10, 1946.

[30] See also *Galea* v. *Galizia*, November 8, 1935, Vol. 29, 1, 345.

> authorities are totally distinct. . . . Consequently, when within the administrative sphere, the Government enters into a contract with a private individual, the Government is bound to respect that contract but it does not thereby deprive itself of its political power to issue orders that may become necessary by reason of public order, *iure imperii,* even though in consequence of such orders the contract itself becomes impossible of fulfilment'.[31]

In this way we may say that the two legal persons composing the Government can act in opposition one to the other, with complete freedom. The theoretical correctness of the basic distinction cannot be doubted but, as it has been interpreted and applied, the distinction has very serious potentialities, and it is only on this score that one must feel unhappy with such decisions as *Buttigieg* v. *Cross.*[32] It is agreed that the Crown in making a contract does not renounce its 'political' rights; and, therefore, any subsequent acts issued in its political capacity are no doubt valid. If any such act happens to run counter to some contractual obligation which had been assumed, that obligation is temporarily paralysed, but it is by no means extinct. The vitality which it still retains manifests itself whenever a solution to the difficulty lies at the discretion *iure administrationis* of the contracting authority: it will still be incumbent on that authority to apply the necessary remedy[33] in order to continue giving execution to the contract in good faith. In this way the danger of arbitrary non-fulfilment of contractual or quasi-contractual obligations assumed by the Government will be considerably lessened.

Finally, there is another class of cases which deserve some notice. In *Camilleri* v. *Gatt*[34] the Government had lowered the level of a road. Consequently the plaintiff, who was the owner of the houses bordering on the road, had to build a staircase to every door. He, therefore, sued the Government for damages. His claim for damages was allowed, but it was not denied that the Government had acted in its political capacity in ordering the lowering down of the road's level.

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[31] The Judicial Committee in considering the case commented: 'In these circumstances, the contentions advanced before the Board fail and the result arrived at by the Court of Appeal was in the opinion of their Lordships correct. On this view of the matter it is unnecessary for their Lordships to consider whether the precise grounds upon which the Court of Appeal based their decision were or were not valid and particularly whether the distinction relied upon between the *ius administrationis* and the *ius imperii* exists under Maltese Law. Their Lordships accordingly express no opinion upon this matter' (October 10, 1946, Appeal No. 79 of 1944).

[32] However, it must be pointed out that the case was ultimately decided on the ground that no contract with the Military Authorities had been proved.

[33] This idea seems to be the premise of the judgment of first instance aforementioned.

This case has never been overruled and I think it implies the existence of three types of acts, namely:—

(a) Acts *iure imperii* necessitated by public policy in regard to which the Government is not liable in any way;
(b) Acts *iure imperii* for purposes other than the above in relation to which the Government is liable for damages but not for reinstatement;
(c) Acts *iure gestionis* which are regulated by normal principles of law.

This theory of governmental responsibility is admittedly non-British in origin, but there is no reason to consider the position anomalous, for the Maltese courts are perfectly free in developing the theories they feel most suitable for the proper administration of justice, unless, of course, they are bound by statute; and it may be added that the tendency has been towards widening the orbit of governmental responsibility. It is enough to mention that if it is proved that the Government was negligent in the choice of its officials, and these officials commit some tort, the Government is liable for damages on the basis of *culpa in eligendo*.[35]

III

So far I have dealt with the first two types of conflict. The third and last type of conflict now requires investigation.

The application of the nationality laws gives us a remarkable illustration. Whenever any difficulty on points of nationality arises, the British Nationality Acts are applied *in toto* and it is natural that the Maltese courts should aim at interpreting those Acts in the same spirit in which they are interpreted in England.

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[34] May 17, 1902, Vol. 18, 2, 170. On this judgment see the present writer's note in the *Law Journal* (*Malta*), Vol. 1, Part 5, p. 12 *et seq.*

[35] *Borg* v. *Gouder*, July 4, 1922, Vol. 25, 1, 1106; *Galea* v. *Borg*, Dec. 2, 1913, Vol. 22, 2, 162; *Bonnici* v. *Domville*, April 16, 1914, Vol. 19, 2, 39.

But a reservation has to be made in regard to all cases in which some element of public policy militates against a particular interpretation of the nationality laws.

On this point a very interesting problem arose in 1945. In Libya there were a certain number of Maltese traders and workers who settled there. These people were Roman Catholics and, naturally, many of them got married in Libya according to Roman Catholic rites. Now before the Lateran Treaty of 1929 the law operative in Libya recognised only civil marriages, and a purely ecclesiastical marriage was not productive of civil effects. In 1945 people born of these marriages requested the Passport Officer in Malta to issue them a British passport, and a difficulty arose as to their nationality. Were they British subjects or not? Everything centred round their legitimacy. If they were legitimate, then as lawful issue of British subjects, they could be entitled to British nationality; but if they were illegitimate, according to the law in force at the time of their birth, they would not be British subjects, because they had been born on foreign soil.

No case has been brought before the Courts of Justice, but in the judgment in *Warrington* v. *Carter*[36] we have a statement of the legal position which has never been contradicted, namely that the Maltese courts will not declare null a marriage solemnised according to Roman Catholic rites in any country whatsoever. The reason for this decision, I think, can be described as follows: marriage in Maltese law is predominantly a religious matter and a Maltese court, naturally, sees no reason for nullity in the fact that a marriage is celebrated in a purely ecclesiastical way. The fact that the Nationality Acts are British Acts and that English law would not have held them to be British nationals[37] cannot affect the issue, for Nationality Acts form part of the law of Malta on the same level with other laws and, therefore, must be interpreted and applied in a way which would not be in conflict with public policy in Malta.[38]

This is only one illustration of the influence which public policy may have on the application of British Acts in Malta. There is ample scope for such conflicts in the field of marriage and divorce, and of civil status in general, for the courts have always followed a very firm and intransigent attitude.[39] It is true that on many questions of private international law the Maltese courts have followed English law; for example, domicile and not nationality is held to be the decisive element in the search for the personal law. But on all matters concerning civil status they have followed somewhat unorthodox lines, relying chiefly on the doctrine of public policy. British Acts applicable to Malta must, of course, be interpreted in that light, for, as it has been correctly affirmed in an editorial note in the *Law Journal* (*Malta*),[40] whether a law is a British Act or not 'it is always a Maltese court that has to apply it'.

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[36] October 5, 1923, Vol. 25, 2, 433.

[37] It must be noted that both parents at the time of birth were domiciled in Libya. See J. M. Jones, *British Nationality Law and Practice* (1947), p. 133 and *Dicey's Conflict of Laws* (5th ed.), p. 157.

[38] See Judgment of the First Hall of the Civil Court of June 17, 1882, Vol. 9, 740.

In this paper I have told you in brief outline about some of the adventures of British public law in a southern clime. Just as a traveller who settles abroad absorbs certain characteristic traits of his new home, in the same way British public law does not remain exclusively British when it comes under a Mediterranean sky. In its own field of public law, no system can compete with it, but directly or indirectly, it must feel the influence of the civil law education which surrounds it. It would still be fundamentally British though in a southern setting.

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[39] See *Low* v. *Low* on Divorce, June 27, 1892, Vol. 13, 243; see also *Wolgeschaffen* v. *Lanzon*, January 13, 1874, Vol. 7, 5.

[40] Vol. 1, Part 4, p. 14.

13

THE ORIGINS OF ADMINISTRATIVE CENTRALISATION

M. W. Thomas

In the England of the eighteenth century, it has been said, there was the 'combination of an absolute centralisation of legislative power with an utter absence of administrative centralisation'[1] The pattern of government must always be determined by the contemporary view of the functions of the legislature, and although Blackstone's doctrine of the omnipotence of Parliament had long won universal approbation, the limitations on parliamentary activity implicit in the acceptance of *laissez-faire* had precluded the development of an organised bureaucracy. In the spheres of local and central government alike the tendency had been to place executive power to a large extent in the hands of the non-professional and unpaid magistracy. These men, well-to-do clergy and landed gentry, had been able to support the burden laid upon them so long as that burden was not too heavy, but when there began to emerge a new and challenging conception of the rôle that the State should play, when *laissez-faire* began to yield ground to collectivism, their day was past.

The new philosophy born of the ferment of that buoyant and expanding era raised many fresh problems. The old distinctions between *fas* and *nefas,* formerly so clearly drawn and so sharply defined, became blurred and obscured, for social legislation brings within the pale of the law activities that are not, *per se,* immoral or reprehensible. Individual liberty must be subordinated to the common good, restraints must be imposed where none had hitherto existed. The temptation to flout or evade the law became all the more insidious when these restrictions involved financial loss, personal hardship, or merely inconvenience, and thus the problem of providing checks and controls assumed a paramount importance. Machinery that had functioned well enough in former times could not sustain the new demands now made upon it, and it became the task of statesmanship to replace it by a tool of much greater strength and flexibility.

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[1] L. Stephen, *The English Utilitarians,* 1900, Vol. 1, p. 30.

Such administration as existed was local, unco-ordinated and centrifugal. What was needed was executive power, centralised, directed and centripetal, through the agency of which these extensions of legislative activity could find their consummation. So it came about that one of the most characteristic features of the political development of the nineteenth century was the growth of a system of centralised administration. In the spheres of education, poor law and local government the process can be observed, but the classic field of study is provided by the slowly evolving code of factory legislation. It was here that the opposing forces of individualism and collectivism came into the sternest conflict, that the deepest human emotions were brought into the sharpest focus, as the piety of the humanitarian evangelicals was matched against the rugged and often callous self-interest of the textile lords. Over this grim battle-ground loomed the dark shadow of uncertainty and ineffectiveness. The legislature knew precisely the reforms it desired to achieve, but the means of enforcement were lacking. It was to this problem that the genius of Edwin Chadwick, inspired by the political philosophy of Jeremy Bentham, supplied the solution—the centralisation of administration.

The early years of the nineteenth century were an epoch of transition, for the vast social and industrial upheaval due to the introduction of machinery in the textile manufacture made it imperative that the State should extend its field of operation. Hitherto Parliament had steadfastly refused to intervene in the private affairs of the citizen, considering all such matters as the regulation of hours, wages and working conditions quite beyond its purview. Such an attitude of aloofness could hardly be maintained, however, when young children became subject to the full rigours of the factory system, and it was Sir Robert Peel himself who took the initiative, when in 1802 he introduced the Health and Morals of Apprentices Bill. The full implications of this measure were not realised at the time. The debate was not recorded in *Hansard,* the manufacturing interests remained complacent, and the general public were unaware that any significant change of policy had been introduced. The truth was that the ancient ramparts had been mined, and the first breach made in the bastions of *laissez-faire*. The result was momentous and inevitable. Steps once taken could not be retraced. The legislature, having recognised the existence of an evil, had taken action to mitigate it, and in so doing had set in motion a train of events that was destined to have consequences quite unforeseen at the time.

The object of the Act of 1802 [2] was to provide for the health, education, and general well-being of the pauper apprentices who were employed in such large numbers in the textile mills of the midlands and the north. It was easy enough to prescribe the conditions under which these boys and girls were to work, but what steps could be taken to enforce the regulations? The mill-owners, it is true were 'strictly enjoined and required to pay due attention to and act in strict conformity to the said rules and regulations',[3] but that was scarcely sufficient. It was necessary to set up some machinery to supervise the working of the Act, and Parliament employed the only means at its disposal. At their midsummer sessions the magistrates were required to appoint two persons, a Justice of the Peace and a clergyman of the Established Church, to make periodical visits to the mills. They were given full powers to enter and inspect, and they were to make regular reports to Quarter Sessions.

The responsibility with which they were entrusted was quite beyond the competence of these amateur inspectors. The mill-owners, impatient of control, and fearful that their manufacturing secrets would be divulged, were openly hostile. Many of the mills were so remote and inaccessible that the task of visiting them regularly was burdensome and expensive. Inspection, always perfunctory, finally ceased altogether, and the Act became a dead-letter.

The introduction of steam power caused many factories to migrate from rural areas to the great centres of population, where there was an abundance of labour. Thousands of children were now employed under the harshest conditions, and so desperate was their plight that on three separate occasions, in 1819,[4] 1825 [5] and 1831 [6] Parliament was moved to enact laws, the object of which was to regulate hours and to impose a minimum age for employment. Enforcement was still left to the local magistrates, and though an effort was made to secure impartiality by forbidding those Justices who were millowners to adjudicate in factory cases, the new laws were no more effective than the Act of 1802. The agitation engineered by Richard Oastler and his friends goaded the Government to further action, and in April, 1833, a Royal Commission was set up to inquire into the whole question of factory reform.[7]

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[2] An Act for the preservation of the health and morals of apprentices and others, employed in cotton and other mills, and cotton and other factories—42 Geo. 3, c. 73.

[3] 42 Geo. 3, c. 73, s. 1.

[4] 59 Geo. 3, c. 66.

[5] 6 Geo. 4, c. 63.

[6] 1 & 2 Will. 4, c. 39.

The Report of the Commission was published nine weeks later. 'We find', it said, 'that in country situations the existing law is seldom or never attempted to be enforced, that in several principal manufacturing towns it is openly disregarded, that in others its operation is extremely partial and incomplete, and that even in Manchester, where the leading manufacturers felt an interest in carrying the Act into execution as against the evasions practised by the small millowners, the attempt to enforce its provisions through the agency of a committee of masters has for some time back been given up. On the whole we find that the present law has been almost entirely inoperative with respect to the legitimate objects contemplated by it, and has only had the semblance of efficiency under circumstances under which it conformed to the state of things already in existence'.[8]

To the Central Board, whose task it was to frame the Report based on the evidence of the Commissioners who had conducted their investigations in the four chief centres of the textile industry, there had been appointed Thomas Southwood Smith, literary secretary since 1830 to Jeremy Bentham, and Edwin Chadwick, a devoted disciple of the great reformer. In popular estimation Chadwick's title to fame rests on his work in the fields of public health and the poor law. But to remember him for this alone is to do him less than justice, for it was he who inspired the Report of the Factory Commission which was responsible for the creation of administrative machinery that enabled these early essays in social legislation to function successfully.

The gist of the problem, as Chadwick saw it, was how to devise a balanced and co-ordinated system of control—control that should be steady and not spasmodic, universal in its operation, yet deriving its force from centralised direction, human in its application, but efficient in its methods. The experience of the past thirty years had taught him that if this was lacking, all was lacking. Simply to enact a code designed to protect the children and curb the rapacious appetites of their masters was the merest fantasy. Executive power wielded from the metropolis was singularly ineffective in Bradford or Manchester. That power must be made a reality, and it must be exercised on the spot, in the great cities no less than in the industrial hamlets. The law must be vindicated wherever the King's writ ran, and those who had hitherto disregarded its provisions with impunity must feel the weight of its authority however remote they might be from the field of its normal operation.

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[7] *Hansard* (1833) 17, 113.

[8] *Parl. Papers* (1833) 20, p. 36.

How was this to be achieved? The statutes passed between 1802 and 1831 had been ineffective because there were no means of enforcing them. Experience had proved that it was idle to rely upon the local magistrates, for these men were not directly responsible to the central government. They had no incentive to carry out the terms of an unpopular edict, they could maintain no steady pressure, they were independent, isolated units whose actions could not be controlled. In these circumstances there could be no uniformity of practice or procedure, and it was not therefore surprising that the Factory Acts were universally disregarded.

The Benthamites had long maintained that the solution to this problem lay in the appointment of some centralised agency, deriving its authority from the government to which it was responsible, armed with full powers, and able to wield those powers throughout the length and breadth of the land. Local exclusiveness must be broken down, and the executive must establish direct contact with those to whom the law applied. They believed that this could be best attained by appointing a small number of paid officials whose duty it would be to tour the country, and to satisfy themselves, by personal inspection, that the law was being obeyed.

Such an opportunity of putting these views to the test of practical experience was not likely to recur, and Chadwick did not hesitate. 'Several eminent manufacturers', declared the Report of the Factory Commission, 'have represented to us that the only certain method of securing obedience to any legislative measures on this subject would be by the appointment of officers charged with the powers and duties requisite to enforce their execution. In general it is conceived that the officers ought to be resident, and should be charged with exclusive jurisdiction of complaints relating to the infraction of legislative regulations of manufactories. . . . The greater necessity of the appointment of some special agency for the enforcement of the measures we have recommended must be admitted, when it is recollected that they relate solely to the children, and are not directly conducive to the immediate interests either of the master manufacturers, or of the operatives, or of any powerful class, and are not therefore likely to receive continuous voluntary support. On the whole we recommend the appointment by the Government of three inspectors to go circuits of the chief manufacturing districts, at intervals as short as may be practicable, and exercise the functions with which they may be invested for carrying the law into force. For this purpose each inspector should have the right of entering all manufactories where children are employed, and of ordering machinery to be fenced off, and directing arrangements of a sanitary nature. . . . He should have power to hear and determine all complaints of infraction of the provisions of the law, to give directions with relation to them to peace officers, and fine for neglect. It should be the duty of the inspectors to meet as a board, to report periodically to the Government for the use of the Legislature as to their proceedings and as to any amendments of the law which they might find requisite or which might be called for'.[9]

The bill that was introduced in the Commons shortly after the publication of the Report had been prepared by Chadwick, and in August, 1833, Althorp's Factory Act[10] became law, most of the Commission's recommendations being incorporated. To Chadwick had been afforded the opportunity of testing the validity of the Benthamite philosophy on the grand scale, and he seized that opportunity with both hands. Four inspectors of factories were appointed. They were authorised to enter the mills at all times, to take evidence on oath,[11] and to prescribe the form in which registers of daily work were to be kept. They were empowered also to issue regulations having the force of law, such regulations to become operative after they had been published during two successive weeks in the local newspaper.[12] They were vested with the powers of magistrates, including the right to inflict fines or impose imprisonment for breaches of the law, or of the regulations they had made.[13] At least twice a year they were to meet in conference, and they were to submit reports to the Secretary of State at six-monthly intervals.[14] Each inspector was to be solely responsible for the district to which he was appointed, and each was to be assisted by four or five subordinate officers or superintendents, whose powers were strictly limited.

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[9] *Parl. Papers* (1833) 20, pp. 72–73.

[10] An Act to regulate the labour of children and young persons in the mills and factories of the United Kingdom—3 & 4 Will. 4, c. 103.

[11] *Ibid.*, s. 17.

The men appointed, Leonard Horner, Thomas Howell, Robert Saunders and James Stuart, could not complain that they were armed with inadequate powers for the accomplishment of the formidable task that lay before them. They combined in their own persons the full range of governmental power, executive, legislative and judicial, and many of the factory owners, conscious that for the first time control was to become a reality, were swift to criticise so unwanted a range of authority. Robert Greg, one of the most vociferous opponents of reform, voiced the views of many of his fellow millowners. 'It cannot be denied', he declared, 'that the powers of the inspectors are already greater than were ever before committed to any individual in this country, and greater than ought to be entrusted to *any* individual in *any* country. In all matters not specially provided for by the Act, the inspector's *will,* is *law without appeal;* his mere *ipse dixit,* proclaimed in two successive newspapers, *is the law of the land;* it is subject to no discussion, no scrutiny in a committee, no first, second, and third reading, no transit through a second legislative chamber.

'The inspector can, it appears, "*convict on view*". What could a Pacha of Three Tails desire more? What farther power remains to be granted, unless it be that of hanging a millowner without trial, and leaving his body to the surgeons for dissection?'[15]

Opposition to the new régime was not confined to the owners. The operatives, fearful lest their demands for a ten-hour day should be thwarted by legislation designed only to protect young people, were equally hostile. The Manchester Short-time Committee contended 'that no such exercise of arbitrary and unconstitutional power is recorded in the annals of the country', declaring that the inspectors were wielding 'more than kingly power'.[16]

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[12] *Ibid.*, ss. 18, 25.
[13] *Ibid.*, ss. 32, 33, 38.
[14] *Ibid.*, s. 45.
[15] R H. Greg, *The Factory Question* (1837), pp. 129–130.

The Benthamites, on the other hand, believed that the process of centralisation should be carried a great deal further, holding that the close relationship that must necessarily be established between millowners and inspectors would deflect the latter from the path of duty. 'To such influences', they said, 'all men placed in such a position must be exposed: but from such interests, which are sinister interests, a central authority is free. Accordingly, when a measure is to be enforced, which is opposed to established interests, it is uniformly found that that measure is best worked by an authority which never comes into direct contact with the interests that are to be operated upon. . . . An authority wholly removed from all political contentions and influence and responsible only to Parliament should be constituted, to which the visiting inspectors should report, and from which they should receive their instructions. There is every reason to believe that the appointment of such functionaries would ultimately accomplish, in a very complete degree, every object contemplated by the Legislature'.[17]

In its attempt to regulate the conditions of the factory children Parliament had entered upon a new and uncharted territory. The omens could scarcely have been less auspicious, for this extension of the legislative sphere brought the State into direct conflict with the most elemental of human passions, the greed of the parents, who looked to their children to supplement their own earnings, and the desire of the owners to remain free from external control in the conduct of their business.

The task that confronted the inspectors was thus one of almost overwhelming difficulty. It was not only that they had to face a bitter and sustained opposition from millowners and operatives alike: they were faced with other problems no less urgent. The Act they were called upon to administer was an entirely new departure, imposing close and detailed control upon a widely-scattered and rapidly expanding industry that had hitherto suffered no regulation. It was singularly ill-adapted to its purpose, for in many respects it was loosely drawn, presenting abundant opportunities for the exercise of ingenuity on the part of those whose main object was to evade its more irksome provisions.

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[16] *Parl. Papers* (1838) 45, p. 81.

[17] *The London and Westminster Review,* October, 1836, pp. 207–213.

The inspectors had no precedents to guide them. There was no fund of accumulated experience upon which they could draw in facing the problems with which they had to deal. Their progress must necessarily be by way of trial and error, but if the Act that had called them into existence turned out to be ineffective in practice, it had the supreme merit that it allowed full scope for experiment in a field where experiment was the *sine qua non* of ultimate success.

It was not lack of purpose that had induced the framers of Althorp's Act to bestow such wide and unprecedented powers on the inspecting officers. Their aims were clear, their goal well defined. They intended to limit the working hours of factory children, to impose a minimum age for employment, and to afford opportunities for education. But how were these ends to be attained? They had embarked upon a revolutionary experiment, and their path was beset with pitfalls. To have attempted to incorporate in the statute all the intricate apparatus of control, to have laid down a series of administrative regulations, would have been to court disaster, for at this juncture it was beyond any man's power to predict what the situation would require. It was the deliberate policy of the Benthamites to wait upon events, to tackle each problem as it arose, to retain the maximum degree of flexibility and fluidity. Crystallisation, definition and rigidity would follow later, when experience could offer guidance, and since the centralisation of authority was inherent in their philosophy of government, the discretionary powers that they were prepared to grant during the formative years were steadily curtailed when the need had passed.

The first duty of the inspectors was to establish a working relationship with the millowners, whose opposition to the new régime had already given the Government grounds for anxiety. Instructions from the Home Secretary, under whose direction the inspectors worked, led them to adopt a friendly and cautious attitude. 'Your best chance of success', the superintendents were told, 'will be a courteous and conciliatory demeanour towards the millowners; and by impressing on their minds that the object of your visits is rather to assist them in conforming to the Act and Regulations thereon founded; and to explain what they may find is difficult to understand, rather than to fish out grounds for complaint. It should be kept in mind that the Act itself is a novelty . . . and that a gradual and quiet introduction of its observance by the body of manufacturers is the most likely method to perpetuate its benefits'.[18] The result was not encouraging. Great issues were in the balance, and such gentle methods were calculated only to encourage defiance of the law.

Their experiences during the first twelve months led the inspectors to believe that it would not be possible to limit the labour of children under 13 years of age to forty-eight hours a week, as was proposed. To do so, it was considered, would reduce the hours of the adult operatives who were dependent on the labour of the children, and to this the owners were resolutely opposed. 'We are very strongly impressed with the conviction', declared the inspectors, 'that it will be extremely difficult in practice, if not wholly impossible, to limit the labour of children, who are 12 years of age, to forty-eight hours in the week, without a serious injury to the masters and workpeople'.[19] Impressed by this unanimity of opinion and encouraged by powerful representations made on behalf of the millowners, the Government introduced a bill[20] to repeal the offending clauses in Althorp's Act. But they had not assessed the weight of the opposition that their proposal would arouse, and after a short but bitter debate, the bill was withdrawn, Russell having pledged his word that the existing law should be rigorously enforced.

It was clear that a new approach was needed. The responsible officers appointed by the central authority had failed, and they had failed because a timid government had not given them sufficiently explicit directions. They had been left to work out their own salvation and, as they afterwards confessed, they had misjudged the situation.

Administrative machinery had been set up, but it had proved inadequate to the purpose for which it had been designed. It needed the drive and control of a central motive force, and it must be the duty of the Home Office to supply that force. So long as the four inspectors worked independently, each devoting himself exclusively to the district for which he was responsible, so long would their administration remain ineffective. This was self-evident to the Benthamites. 'Each inspector', they affirmed,[21] 'adopts a different view, necessarily a partial, and so far an incorrect one, as to what is expedient or inexpedient, practicable or impracticable. . . . Were all these men highly intelligent, perfectly well qualified for their office, and zealously devoted to their duty, they would be precluded, by the very occupation of their time and thoughts in the discharge of their specific functions, from the means and opportunity of discriminating and considering the circumstances common to the whole manufacturing body and those peculiar to particular localities; and they would, therefore, be incapable of forming a correct judgment of the regulations practicable and expedient for all. This can only be done by minds which see the whole, and by a body which is responsible for the working of the entire measure'.

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[18] *Parl. Papers* (1835) 40, p. 698.
[19] *Parl. Papers* (1834) 43, p. 492.
[20] *Parl. Papers* (1836) 4, p. 1.

The Home Office now embarked upon a radical change of plan, designed to transfer power, initiative and the formulation of policy from the inspectors to itself. The process was gradual, but progressive and sustained. It culminated in the great Act of 1844,[22] in which was enshrined, as the result of pressure extending over nearly a decade, a system of centralised control that was to be the basis of all future development.

The Act of 1833,[23] designed as it was to secure reasonable working conditions for the young factory operatives, impinged upon the freedom of the manufacturers at many points. Buildings were to be lime-washed, hours of employment were regulated, overtime was controlled, holidays became obligatory, a minimum age was imposed, and education became compulsory. In 1835 it was calculated that 3,154 factories employing over 157,000 children and young persons, were subject to the provisions of the Act.[24] 'The vigilance of inspectors', said Wing, 'is not a match for the money-getting spirit of the masters, and the stimulating effect of higher wages upon the workmen. The apparatus for carrying the present Act into effect is palpably inadequate; the few inspectors and superintendents that are appointed would need the eyes of Argus, the hands of Briareus, and the seven-league boots of Jack the giant-killer, with his coat of invisibility, to discharge their duties effectually. . . . An Act, to be effectual, should resemble the machinery, and be in some measure automotive. The present Act enlists so many interests against itself, that it has been, and will continue to be, defied or evaded'.[25] However active they might be in pursuing their investigations, the four inspectors and their seventeen superintendents could not possibly operate effectively over so wide a field unless they devised administrative machinery that would provide a continuous and authentic record of the interior economy of the mills.

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[21] *The London and Westminster Review,* October 1836, *loc. cit.*

[22] An Act to amend the laws relating to labour in factories—7 & 8 Vict., c. 15.

[23] 3 & 4 Will. 4, c. 103.

[24] *Parl. Papers* (1836) 45, p. 51 *et seq.*

Mindful of this consideration the legislature had conferred upon the inspectors authority to make 'such rules, regulations and orders as may be necessary for the due enforcement of the Act'.[26] During the first three years the inspectors occupied themselves in designing registers that would provide evidence of the extent to which the law had been obeyed. The millowners were placed under an obligation to certify the authenticity of these records, which were always to be kept available for inspection, so that the visiting officers could check their accuracy by cross-examination of the operatives.

The first registers were crude and cumbersome, requiring a daily record of the hours worked by each person, with details of the intervals allowed for meals. This involved considerable clerical work, for a fresh list showing the names of the operatives had to be written out each week. Even so the check was ineffective, and in less than two years no fewer than five amended registers were introduced, each designed to provide against evasion of the law. The millowners reacted sharply. 'This is drawing rather heavily upon the patience of the unfortunate millowner', complained Greg, 'who, before he could well introduce one system into his establishment was compelled to abandon it in favour of others'.[27]

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[25] C. Wing, *Evils of the Factory System Exposed,* 1837, p. 27.

[26] 3 & 4 Will. 4, c. 103, s. 18.

[27] R. H. Greg, *The Factory Question,* 1837, p. 128.

The inspectors nevertheless persisted in their experiments, until finally Horner evolved a system that was at once simple and comprehensive. For the individual records of working hours was substituted a general statement of the hours of the whole body of protected persons, showing the time allowed for meals, time lost and recovered, and incorporating a record of holidays granted, together with details of lime-washing. This gave the inspector the information he needed to enforce the Act, and this form of register was adopted in the Factory Act of 1844.

This technique, whereby those who were subject to regulation were obliged to record the extent to which they had accepted the controls imposed upon them, was extended over a wide field. By the summer of 1836 Horner had promulgated regulations designed to provide extrinsic evidence as to premature employment, the working of excessive hours, cleansing of factory premises, holidays, educational facilities and information concerning the opening of new mills.[28] It was this administrative procedure that made it possible for the inspector, with the limited forces at his command, to enforce the law, and the best testimony to the effectiveness of the new method was the response of the millowners. 'It is much to be regretted', said Greg, 'that the present Factory Law and the regulations of the inspectors tend to destroy all good feeling, and to aggravate misunderstandings where they exist. The inspector's regulations are founded upon the principle of the master being a tyrant and a cheat; and that the operatives must look to the inspector rather than to him for justice and protection'.[29]

In the midland district alone had this procedure been adopted as a matter of routine: elsewhere the regulations were fragmentary and inchoate. It was obviously desirable to secure uniformity, and to extend the system of control by registration to the other divisions. Accordingly, in September, 1836, the Home Office directed the inspectors to prepare a code of regulations to be applied in every district. The consolidated code,[30] based on the regulations already drawn up by Horner for his own division, was submitted to the Home Secretary a week or two later. No further additions were made, and when these rules were incorporated, almost in their entirety, in the Act of 1844, it became possible to deprive the inspectors of their legislative powers.

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[28] *Parl. Papers* (1836) 45, p. 215 *et seq.*
[29] R. H. Greg, *The Factory Question*, 1837, p. 127.
[30] *Parl. Papers* (1837) 31, p. 88 *et seq.*

This process of centralisation was carried a stage further early in 1837. The opponents of factory legislation commanded powerful support in the House of Commons, and the Government was frequently called upon to answer for the policy and conduct of the inspectors. It did not shrink from this responsibility, but it soon became evident that the enforcing officers could not be left free to interpret the highly technical sections of the Act as they wished. They were not trained lawyers, and their opinions ought therefore to be scrutinised by the Law Officers of the Crown if the Government was not to be placed in an embarrassing position. Accordingly, in March, 1837, they received from the Home Office an intimation that they were to issue no instructions (as opposed to the formally promulgated regulations) until the Law Officers had satisfied themselves of their validity.[31]

So it was that by the simple method of administrative action the Home Office virtually deprived the inspectors of powers that had been conferred upon them by statute. But the tendency to shift the focus of power from the inspectors to the Home Office did not stop here. It had been customary for the local benches to refer to the inspectors many difficult points of law that required to be elucidated. This practice having been stigmatised as 'irregular and attended with serious inconveniences', a circular was addressed to the superintendents informing them that 'in all cases wherein magistrates entertain doubts as to the construction of any section of the Factory Acts, you will state that the Secretary of State for the Home Department expects they will communicate such doubts directly to him, and not through the Inspector of the District'.[32]

Magisterial powers, too, were curtailed. The inspectors had been authorised by the Act of 1833 to adjudicate in alleged breaches of the law, and Horner in particular had frequently 'convicted on view', calling defendants before him in the factory, hearing sworn evidence, and imposing fines on the spot. 'The Home Secretary', it was announced, 'does not think it desirable that, in the first instance, an Inspector of Factories should hear informations. Lord John Russell thinks it better that the information should be heard by the magistrates of the district, and that it will be proper only in the event of their failing to do so, that subsequent informations should be heard by the inspector'.[33]

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[31] *Home Office Papers,* H.O. 87 (1), p. 45.

[32] *Minutes of the Factory Inspectors,* Vol. 2, p. 247.

Thus it was that the passing of the years brought a truer conception of the respective métiers of the central government and its officers. It was for the government to formulate policy, and to create the machinery to give effect to that policy; it was the task of the officers to enforce the law, and if they were to do this effectively their functions must be purely executive.

This gradually emerging view implied a further process of definition, for it was becoming increasingly necessary to evolve some code that would regulate the relationship that should exist between the inspectors and the Home Office. That relationship had not been defined by statute—it was left to the parties themselves to arrive at a satisfactory working agreement. It was desirable, of course, that they should act together in complete harmony, each in an allotted sphere, but there was as yet, no corpus of precedent, of rule, and of tacit understanding to afford guidance as to what the respective spheres should comprise.

In the early summer of 1837 the Home Office initiated a line of policy that threatened to jeopardise the entire future of the inspectorate. There was considerable unrest and agitation in the manufacturing districts, and since the Home Office, responsible as it was for the preservation of public order, had not the means of assessing accurately the trend of events, it had recourse to the inspectors, whose intimate contacts with the centres of disturbance would enable them to keep the Government informed. Accordingly on May 3 a confidential letter was sent to the inspectors informing them that Lord John Russell desired them to transmit information concerning the state of tranquillity or excitement in their several districts.[34]

Within a few months the revolutionary activities of the Chartists assumed so threatening an aspect that the inspectors were given further instructions, requiring them to make weekly reports concerning the meetings held in their districts. These instructions were issued verbally to the inspectors through Leonard Horner,[35] but Stuart, whose division comprised Scotland and northern England, transmitted them to his superintendents by confidential letter, warning them to act with secrecy and prudence, but making it quite clear that they were to take all necessary measures to obtain the required information.

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[33] *Home Office Papers,* H.O. 87 (1), p. 43.
[34] *Home Office Papers,* H.O. 87 (1), p. 59.

One of these communications came into the hands of John Fielden, an uncompromising opponent of the Factory Acts. Fielden made full use of the opportunity thus presented to him, and in a bitter and vigorous speech before the assembled House, he charged the Government with having set up a system of espionage, the natural corollary, he alleged, of the policy of centralisation. The Government attempted to defend its action, asserting that in times of crisis it was justified in employing all the means at its command to secure the information it needed.[36] The matter was not pressed to an issue, but the lesson had been learned. If the inspectors were to discharge their functions properly they must remain strictly aloof from the political arena. It was their duty simply to enforce the law, and if there were any grounds for impugning their integrity and singleness of purpose, their task would become impossible.

The action of the Home Office, although inexcusable, was not entirely without basis, for it had been recognised from the first that one of the most important duties of the inspectors was to advise the Government about industrial conditions, and to comment on the working of the Act. Previous statutes had been ineffective largely because no accurate data had been available, and it was to the inspectors that the Government rightly looked to make good this deficiency. What the Home Office had failed to realise was that these advisory functions must be rigorously confined to the area in which inspection operated: they must not be enlarged so as to cover the whole of the political field.

Even within this restricted sphere it soon became advisable to impose some limitation upon the discretion of the inspectors. In their early report they commented freely on the inadequacies of Althorp's Act, and since these reports, when printed, were available to the public, the Government was often involved in an embarrassing situation. The Home Office therefore insisted that all controversial topics should be avoided, and that the reports should contain no references to departmental letters or other documents, nor to parliamentary debates. 'The Home Secretary', the inspectors were informed, 'has observed with regret, that while much valuable and interesting information is contained in your reports, there is in some parts of them a controversial tone, which appears to him to be inconsistent with the character which such reports ought to bear. . . . A reference to debates in Parliament, together with extracts from the reported speeches of particular members in debate appears to Sir George Grey to be out of place in your reports. Sir George Grey has no wish to check the free expression of opinion on the part of the inspectors, and he will be always desirous of having the benefit of their experience and suggestions in reference to any points of doubt or difficulty, but as such suggestions may in some cases be properly considered as confidential, it is not expedient that when of this nature they should be transmitted to the Secretary of State in a printed form and embodied in a report, to be forthwith laid before Parliament.'.[37]

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[35] *Minutes of the Factory Inspectors*, Vol. 1, p. 137.

[36] *Hansard* (1840) 55, pp. 785–802.

The impetus towards centralisation was steady, progressive and cumulative. The first stage of development had seen the establishment of a cadre of professional officers operating throughout the country, but responsible to, and in direct contact with the central government. During the second stage the Government had concentrated in its own hands the direction of policy and the reality of power. It now remained for the inspectors to achieve administrative unanimity, securing uniformity of practice and procedure, and evolving a code of conduct and an *ésprit de corps* without which they could not survive as a unified body.

Their half-yearly meetings afforded them ample opportunity of conferring together on matters of common interest, but ten years elapsed before they decided to take formal steps to pool their resources. In 1844 they adopted standing orders, the purpose of which was to ensure that any information relating to one district should be available to inspectors in the other districts. All communications between an inspector and a government department were to be circulated, and a memorandum of verbal messages was likewise to be sent by each inspector to his colleagues.[38] Two years later it was agreed that no reports should be submitted to the Home Office until they had been discussed and approved at a joint conference.[39]

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[37] *Minutes of the Factory Inspectors,* Vol. 2, pp. 418–419.

It was, of course, eminently desirable that the four inspectors should speak with one voice, especially when they were speaking to the Home Office. Prior to 1844 the obstacle had lain in the fact that there existed no central office to act as the clearing house and channel of communication. Each inspector worked from his private residence, and when they asked, in 1836, that they should be provided with a room in London from which to transact their business, their request was curtly rejected.[40] Sometimes they met together in the Privy Council Office, sometimes in a waiting room at the Home Office, but they had no permanent headquarters until the Act of 1844 provided specifically that a central office should be made available for them. Thereafter they occupied for a time two rooms in Duke Street, but in August, 1847, they were given accommodation on the third floor of the Home Office. Here they were allowed the services of a messenger, a housekeeper and a clerk. The cost was not excessive—the annual charge, including wages, coal, candles and postage, amounted to some £300—but the gain was enormous. Proper records could now be filed, and through the office information could be disseminated. An efficient secretariat is essential to a centralised bureaucracy, and the demands now being made of the inspectors rendered such provision indispensable.

The authority that they wielded made it imperative that the inspectors and their subordinate officers should stand high in the public esteem, free from any suspicion of partiality, self-interest or collusion. A rigorous code of discipline had to be evolved, and this was not the least of the problems that confronted them. Their widely scattered districts compelled them to rely largely on the superintendents who were resident in each locality, and these men were sometimes corrupt and often insubordinate. Robert Baker granted certificates that should have been issued only by independent medical practitioners, Daniel Webster accepted bribes from millowners and solicited loans from

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[38] *Ibid.*, at pp. 92, 100.

[39] *Ibid.*, at pp. 269–270.

[40] *Home Office Papers,* H.O. 87 (1), p. 17.

Members of Parliament, while Charles Trimmer flatly refused to obey the instructions of his inspector.

At the statutory meeting held in July, 1837, the inspectors considered how they might best deal with this situation. They resolved to send to all the superintendents a letter informing them 'that they are to allow no other occupation to interfere with their official duties, but be at all times ready to perform any duty required of them by the inspector which he shall deem necessary for the due execution of the Act'.[41] Detailed instructions were given concerning the daily discharge of their duties, and it was made clear that they were always to act under the instructions of their superiors.

Since the nature of their duties inevitably brought the inspectors into intimate contact with the millowners it became necessary to develop an ethical code that should govern this relationship. During their early tours the inspectors had adopted a friendly and unofficial demeanour that was, to say the least, liable to misinterpretation. 'Nothing could be kinder than the way the millowners have received me', wrote Leonard Horner. 'One of them, Mr. Lepper, has placed his little carriage at my disposal, and I am to dine with him today. Wherever I have been I have been met with the kindest reception'.[42] Such an attitude aroused misgivings in the minds of the operatives, who complained that men who dined with the masters, and feasted upon the luxurious viands provided by the labour of the unfortunate children, could not possibly discharge their duties impartially and effectively.[43] The rejection of Poulet Thomson's bill in 1836 came as a sharp lesson, and thereafter the inspectors as a body adopted a more formal and aloof attitude towards the manufacturers.

That it was desirable to avoid even the appearance of partiality was forcibly demonstrated a few years later, when Stuart intervened on behalf of a boy who had been dismissed from his employment. This called forth a remonstrance from the Home Office, in a letter dated November 25, 1844. 'I am directed by Secretary Sir James Graham to call your attention to that part of your report of October 1, in which you recount a conversation which you have had with Mr. McFadyen on the subject of the dismissal of a boy named Henderson from his employment, after giving evidence in a case of alleged overwork by his employers; and you state that you expressed to Mr. McFadyen, who had described himself as the Secretary of the Short-time Committee for the Eastern District, a hope that that committee would make every exertion within power to procure another situation for the boy.

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[41] *Minutes of the Factory Inspectors,* Vol. 1, pp. 68, 79.
[42] K. M. Lyell, *Memoir of Leonard Horner,* 1890, Vol. 1, p. 287.
[43] *Address to the Friends of Justice and Humanity,* 1833, p. 2.

'Sir James Graham is fully aware that your conduct in this case was actuated by benevolent motives alone, but he desires me to call your attention to the injurious effect on the public service which would inevitably result, were the master manufacturers or the operatives to have reason to believe that the inspectors of factories were in any way connected with the Short-time Committee, or with any body of persons associated together for objects in dispute or respecting which a difference of opinion may arise between employers and employed.

'It is the manifest duty of the inspectors whenever they may receive information of an alleged violation of the law immediately to make inquiry into the facts of the case, and if necessary to bring to trial the accused parties, but it is very desirable that the inspectors of factories should abstain from any communication with the parties composing the committees or associations of the nature to which I have referred except in the character of private individuals'.[44]

Slowly and inevitably the bureaucratic code was being evolved, imposing on the administrative officers such standards of conduct and propriety as were essential to the discharge of their duties. In one important respect, however, the process of unified centralisation fell short of what was requisite, not because the need was unrecognised, but because the inspectors themselves refused to admit the logic of the situation. The Benthamites had always maintained that the successful administration of the Factory Acts required the setting up of a single controlling authority, to which the inspectors should be responsible. A bill introduced in 1841[45] had proposed to appoint an Inspector-General who, working from a central office in London, would survey the whole field of inspection, appoint subordinate officers and draw up administrative regulations. To this suggestion the inspectors were strongly opposed, holding that the existing scheme whereby a small number of officers shared between themselves the full range of administrative power was best designed to secure compliance with the law. So tenaciously did they cling to this view that they even refused to consider appointing one of their number to preside over their meetings. In this highly developed individualism lay the weakness of the system. Strive as they might to secure uniformity of policy the fact remained that each was supreme arbiter in his own district, each could interpret and administer the law with very wide discretionary powers. The unanimity they achieved was but a thin crust, incapable of withstanding the strain and stresses to which it was exposed when controversial political issues were superimposed upon problems of administrative control.

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[44] *Minutes of the Factory Inspectors,* Vol. 2, pp. 277–278.
[45] *Parl. Papers* (1841) 2, p. 425.

Their advisory functions made it difficult for the inspectors to sink their individual personalities in an official anonymity. It was their duty to point out the technical defects of the statutes they were called upon to administer, and to suggest the means by which those defects might be remedied. For this reason they were freely consulted whenever a new measure was being considered by Parliament. They failed to distinguish, however, between matters of procedure and questions of policy, and they allowed their own views of what was politically desirable to colour their administration. In these circumstances it was not surprising that despite all their efforts they pursued on occasion divergent lines of policy.

The violent controversy that raged over the Ten Hours Act of 1847 (10 & 11 Vict., c. 70) threw this weakness into high relief. Many millowners sought to lengthen the working day of the unprotected adult males by employing women and young persons on the relay system. Three of the inspectors held that this practice was illegal, but Stuart announced that he would take no steps in his own district to prohibit false relays. It had been alleged in the past that he had connived at evasions of the law, and it was freely asserted that he owed his appointment to the political influence exercised on his behalf by the Scottish owners. Hitherto his colleagues had supported him in rebutting these accusations, but on the present occasion his attitude threatened to disrupt the entire working of the Factory Acts. The judgment in the collusive action of *Ryder* v. *Mills*[46] merely added to the confusion, for the Barons of the Exchequer endorsed Stuart's view as to the legality of the relay system.

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[46] See *The Champion*, Vol. 1, No. 18, pp. 280–283.

The Acts passed in 1850[47] and 1853[48] prohibited relays, but the inherent weakness of divided control had amply demonstrated the validity of the Benthamite contention that one supreme directing authority was necessary.

The successful translation of legislative policy into executive action had been made possible because the first inspectors were men of iron will and dominating personality. Herein lay their weakness, for unified control in the fullest sense could not be achieved when each exercised so great a measure of independence.

The formative, experimental era, however, was drawing to a close, and when Alexander Redgrave, erstwhile clerk in the central office, was appointed Chief Inspector in 1878, the process of centralisation, in its broad outlines, was carried to completion.

The pioneers had borne a heavy responsibility, and they had wrought a great work. They had demonstrated that legislation, and social legislation in particular, can be effective only when centralised executive power is applied locally, and they had shown how to apply it. They had set up administrative machinery that made it possible for a small group of officials to control a great industry. They had evolved a code of conduct regulating the relationship that should exist between the official class on the one hand, and the departmental chief, the subordinate and the public on the other. They had shown that centralisation of authority can combine efficiency with humanity, and they had prepared the way for vast extensions of administrative control. 'This new departure', said Faucher, 'was clean contrary to the tradition of England, where each citizen regards his home and his factory as a castle inaccessible to the power of the State. The system was accepted with much misgiving, but nurtured as it was by wise and honourable men it has borne splendid fruit. If there remains today an aftermath of the venture of 1833, if the administration of the law has not completely broken down, if the ground has been prepared for future reforms, it is to the inspectors of factories that England is indebted'.[49]

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[47] 13 & 14 Vict., c. 54.

[48] 16 & 17 Vict., c. 104.

[49] L. Faucher, *Études sur l'Angleterre* (1856), Vol. 1, p. 457.

14

HUMAN RIGHTS AND THE COLOUR PROBLEM

LESLIE C. GREEN

THE SCOPE OF THE PROBLEM

SINCE the French Revolution and the American War of Independence there has been a great amount of national legislation devoted to the protection and promotion of human rights, but there has been an even greater abundance of legislative measures directed to the evasion of these Declarations and Bills of Rights.[1] The Nazi atrocities in Europe revived interest in human rights and fundamental freedoms, and since the middle of the Second World War there has been a surfeit of speeches and writings on this subject, culminating in the United Nations Universal Declaration of Human Rights adopted on December 10th, 1948.[2]

Too frequently the modern protagonists are so bemused by their own idealistic language that they lose all sense of reality, and we find vast meetings being held to celebrate the first anniversary of the signing of the Universal Declaration, even though during the preparatory discussions the statesmen of the world made it quite clear that the document was completely without binding force,[3] while Mr. Attlee stated in the House of Commons that the British Government did not intend giving legislative effect to the Declaration, for 'it is not expected . . . that any State will be able at once to realise all these ideals'.[4] Nevertheless, UNESCO, in its newspaper, waxed enthusiastic about the rights bestowed upon human beings by this Declaration[5] and Lord Hankey, in his *Politics, Trials and Errors,* has attacked the judgments of the Nuremberg and Tokyo tribunals for having deviated from the principles embodied in this Declaration, which was drawn up and adopted after these judgments were delivered.[6]

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[1] See, for example, Mangum, *The Legal Status of the Negro*, 1940, *passim.*

[2] General Assembly Resolution 217 (iii).

[3] Thus, the Australian delegate pointed out that 'on many occasions during the debate . . . it was stated that the Declaration . . . is not legally binding' (U.N. Doc., A/PV. 181, p. 11, December 10, 1948). The British delegate spoke in similar strain: 'The Declaration was . . . devoid of any obligatory character' (U.N. Doc., A/C. 3/SR. 164, p. 8, November 24, 1948). See also Lauterpacht, 'The Universal Declaration of Human Rights', 25 B.Y.I.L. 1948, p. 354, at p. 356 *et seq.*

[4] January 18, 1949, *Hansard,* 'Parliamentary Debates', House of Commons, 5th series, Vol. 460, col. 17.

There seems to be a veritable conspiracy of silence with regard to any deviations from the straight and narrow path, and little or no reference is ever made to incidents, judicial decisions or legislative measures which detract from respect for human rights. Even the United Nations *Year Book on Human Rights* only reproduces legislative and treaty provisions which promise to promote or respect such rights. It makes no reference to the fate of these provisions in practice.

In this paper an attempt will be made to show that there is another side to the picture. Article 2 of the Universal Declaration states that 'every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other status'. Of the many classifications listed here the one that has been selected for discussion is colour, for it is submitted that the greatest discriminations are based on colour distinctions, and if they could be removed the others would be easier to tackle.

In a letter to *The Times* in 1926[7] Sir Thomas Watt, a South African politician, wrote: 'The white man, English as well as Dutch, is determined to do all he can to remain, and what is more to rule . . . this matter is, to us in South Africa, such a vital and fundamental matter that no ethical considerations such as the rights of man and equal opportunities for all non-Europeans, will be allowed to stand in the way'. Some twenty years later Mrs. Roosevelt, the principal American representative to the Third Committee of the General Assembly of the United Nations, which was concerned with the Universal Declaration of Human Rights, said: 'This Declaration may well become the international Magna Carta of all men everywhere'.[8] In view of these two statements it is perhaps not unreasonable to examine human rights and the colour problem mainly in the light of the situation in the Union of South Africa and the United States of America. However, it is as well to bear in mind the words of a great Negro teacher: 'It is not intended to incite resentment and stimulate animosities. . . . If in the process the sensibilities of some may be wounded, it must be laid, not to intent, but to that unavoidable consequence that sometimes accompanies the revelation of unpleasant truths'.[9]

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[5] *Courier,* Vol. 11, No. 12, January 1, 1950, p. 4.

[6] 1950, pp. 131, 134.

[7] March 30, 1926, cited in Burns, *Colour Prejudice,* 1948, p. 108.

[8] *19 Department of State Bulletin,* 1948, p. 751.

Before proceeding further it is necessary to point out the matters with which we are not concerned. First, territories in which coloured people are suppressed or denied equality of treatment merely because they are colonial subjects, such treatment being part of colonial policy,[10] may be safely ignored, for it is not unreasonable to suggest that a similar policy might well be pursued even though the colonial inhabitants were white. Had this been so, however, it is likely that the territory would, by now, have become self-governing. Second, there is no need to linger on the situation in countries like the Soviet Union in which there is virtually a complete denial of human rights, for in such circumstances it matters little if an individual receives equal treatment so far as the non-existence of rights is concerned.

Colour discrimination finds its basis primarily in emotion and sentiment, as is true of most matters concerning social relations and, as Lord Bryce has pointed out, 'as regards social relations, law can do but little save in the way of expressing the view the State takes of how its members should behave towards one another. Good feeling and good manners cannot be imposed by statute'.[11] It is as difficult to make it illegal for any one to dislike a red-haired man as it is to oblige a local landlady to let rooms to Negro students. Perhaps the emotional character of the problem is most easily seen by reference to an event which occurred in South Africa in 1944. A Government instruction was issued that all official letters were to be addressed to recipients in the same way regardless of their colour. A number of civil servants resigned or accepted dismissal rather than commence letters to African Natives with the terms 'Sir' or 'Madam', or address envelopes intended for them 'Mr.' or 'Mrs.'.[12]

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[9] Moton, *What the Negro Thinks*, 1929, p. vi.

[10] See, for example, Mair, *Australia in New Guinea*, 1948.

[11] *The Relations of the Advanced and Backward Races of Mankind*, 1902, p. 43.

[12] *The Times* newspaper, June 23, 1944, cited in Burns, *op. cit.*, p. 67.

Such prejudices may be deplorable, but they are dangerous only when they have the power of legal support behind them. Perhaps the distinction between private and legal discrimination is best brought out in connection with racial restrictive covenants. In *Kemp* v. *Rubin*[13] the Supreme Court of New York County referred to the Charter of the United Nations and, after pointing out that 'distinctions based on colour and ancestry are utterly inconsistent with our traditions and ideals',[14] upheld the validity of a covenant directed against Negroes and granted an injunction to prevent a Negro from purchasing or occupying the property. In *Shelley* v. *Kraemer*[15] the United States Supreme Court was faced with a similar problem. Vinson, C.J., who made no reference to the Charter, pointed out that so long as the restrictive covenants were effectuated by purely voluntary adherence they were not contrary to the equality guaranteed by the American Constitution, but once an attempt was made to enforce these covenants by judicial process a State organ would become involved, and such discrimination by the State would be contrary to the Constitution. When the Ontario High Court was asked to decide upon the validity of a similar covenant directed against Jews, Mackay, J., after citing the Charter of the United Nations, held that the covenant was void, being contrary to the public policy of Canada.[16] In November, 1949 the Attorney-General was asked if he would introduce legislation to make such covenants illegal in the United Kingdom. Sir Hartley Shawcross declined to do this but said he thought such covenants might well be void as contrary to public policy.[17]

Our problem is, therefore, 'not whether law should punish racial discrimination, or even whether law should try to prevent racial discrimination, or even whether law should interfere with it in any way. The question is whether law should affirmatively support and enforce racial discrimination'.[18]

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[13] (1947) 69 N.Y.S. 2d. 680.

[14] *Hirabayashi* v. *United States* (1943) 320 U.S. 81.

[15] (1948) 334 U.S. 1; *cx. Corrigan* v. *Buckley* (1926) 245 U.S. 323.

[16] *Re Drummond Wren* [1945] 4 D.L.R. 674.

[17] November 21, 1949, *Hansard*, 'Parliamentary Debates', House of Commons, 5th series, Vol. 470, col. 2.

[18] Edgerton, J., United States Court of Appeal for District of Columbia, cited in *To Secure These Rights*, Report of President's Committee on Civil Rights, 1947, p. 70.

WHO IS COLOURED?

Having defined the scope of our problem our next task is to attempt to define 'colour'. Here it must be borne in mind that we are speaking from the point of view of the white races, and that to the man in the street everybody who is not white is coloured. This concept of colour, however, is rarely, if ever, adopted by the law, and a study of varying 'legal' definitions of 'colour' leads one into a veritable quagmire of bewilderment. Furthermore, it must not be imagined that it is only the white races who know how to discriminate against a person on the ground of his colour. In his work on *Colour Prejudice* Sir Alan Burns draws attention to the way in which this emotion manifests itself among the coloured peoples themselves,[19] and he points out that in the Negro Republic of Liberia, a member of the United Nations, 'no one can become a citizen and hold land unless he is of African descent'.[20] Such a law will admit American Negroes, but would exclude Indians, Chinese, whites and possibly Haitian Negroes and mulattoes.

In the Union of South Africa the non-white population is divided into Natives, Coloureds and Indians, and discrimination, great or small, is exercised against them all. The only problem of definition arises in distinguishing the Native from the Coloured. According to the *Report of the Cape Coloured Commission*, a Coloured person is 'a person living in the Union of South Africa who does not belong to one of its aboriginal races, but in whom the presence of Coloured blood (especially due to descent from non-Europeans brought to the Cape in the seventeenth and eighteenth centuries or from aboriginal Hottentot stock, and with or without an admixture of Bantu blood), can be established'.[21] This definition leads one to assume that a South African Native is one who possesses pure aboriginal blood, but 'in South Africa there are a variety of legislative definitions of "Native". For the purpose of births, deaths and marriage legislation the Act[22] defines a Native as "a person both of whose parents belong or belonged to an aboriginal race or tribe", including persons of mixed race living with Natives. The . . . Representation of Natives Act,[23] on the other hand, . . . (defines) a Native as any person who is a member of an aboriginal tribe or race or whose *grandparents* were such. . . . The same Act also defines the procedure by which a "Native" may petition to be regarded by the law as a "non-Native". . . . Only great-grandchildren of mixed marriages can have themselves declared "non-Native"'.[24] Study of these definitions indicates that the concepts of Coloured and Native clearly overlap, and the definition is not simplified in any way by the Population Registration Bill, 1950. In this 'Europeans are defined as persons who in appearance and repute obviously are Europeans. Natives . . . as persons who in fact, or by general appearance and repute, are members of aboriginal races or tribes of Africa. All others will be classified as coloured'.[25]

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[19] *Op. cit.*, pp. 32–37.

[20] *Ibid.*, p. 52, note 2.

[21] *Union Gazette*, No. 54, 1937, para. 14, cited in Hellmann, ed., *Handbook on Race Relations in South Africa*, published by the South African Institute of Race Relations, 1949, pp. 348–349.

[22] Births, Marriages and Deaths Registration Act, 1923.

In the United States the definition of colour is even more contradictory than it is in South Africa. Gunner Myrdal, in his well-known survey of the Negro problem in America, states that 'everybody having a *known* trace of Negro blood in his veins—no matter how far back it was acquired—is classified as a Negro'.[26] The situation was described more brutally by Lord Bryce in his *American Commonwealth*: 'In Latin America whoever is not black is white: in teutonic America whoever is not white is black'.[27]

American practice, however, is not quite so consistent as this. In Los Angeles in 1926 there were certain plants in which Mexicans were regarded as white; here Negroes were not allowed to 'mix' with them. In others, however, they were classified as coloured and not only worked with Negroes but were often supervised by them.[28] This example may perhaps be described as private discrimination, but, as in South Africa, the legal definition varies with the legislative purpose, thus 'an individual of mixed blood may be classified as a white person as far as the law with respect to marriage is concerned and as a Negro with respect to the public school system'.[29] Two decisions of the

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[23] No. 12 of 1936.
[24] Burger, *The Black Man's Burden*, 1943, p. 138.
[25] *The Times* newspaper, February 21, 1950.
[26] *An American Dilemma*, 1944, p. 113.
[27] 1910, Vol. 2, p. 555.
[28] Johnson, *The Negro in American Civilisation*, 1930, p. 78.
[29] Mangum, *op. cit.*, p. 1.

Louisiana Court in 1910 bring out the distinction very clearly. In *Lee* v. *New Orleans G.N. Ry.*[30] it was held that every one with an appreciable amount of Negro blood in his veins is a member of the *coloured* race and subject to the 'Jim Crow' segregation laws. In *State* v. *Treadaway*,[31] however, the Court held that an octoroon was not a member of the *Negro* or *black* race as that term was used in the 1908 act forbidding concubinage between the white and Negro races.[32] In the course of its judgment the court attempted to formulate a number of definitions. 'It declared that the term "Negro" does not necessarily include persons in whose veins there is only an admixture of Negro blood, and that it clearly would not be applicable to a person in whom the admixture is so slight that even a scientific expert could not be positive about its presence. The term "coloured" was said to apply to those having African blood, and this was said to be the general acceptation of the term except on the Pacific coast where persons of Mongolian descent were also included when the term was used. The term "griffe" was said to have a definite meaning in Louisiana, and was defined as applying to the issue of a Negro and a mulatto. It was said that the term "mulatto" indicated an individual who is too dusky to be white and too light coloured to be a griffe. The court also declared that a quadroon is of a lighter colour than a mulatto'.[33] The court distinguished the *Lee Case* on the ground that the statute involved in that decision used the word *coloured*, while the statute with which it was now concerned used the word *Negro*. The discrepancy between these two cases was resolved by legislation. In the same year, 1910, a new concubinage statute[34] replaced the word 'Negro' by 'coloured'.

The problem in the United States is further complicated by the varying State systems of legislation, each of which employs its own definition of colour. Thus Virginia defines persons possessing one-fourth or more Indian blood as *Indian* only so long as they remain on the reservations. Should they move they become *coloured*.[35] Two Tennessee statutes[36] define as a

[30] (1910) 125 La. 236.
[31] (1910) 126 La. 300.
[32] La. Acts, 1908, No. 87.
[33] Mangum, *op. cit.*, p. 5.
[34] La. Acts, 1910, No. 206.
[35] Va. Code Ann., 1930, s. 67.
[36] Tenn. Code, 1925, ss. 25, 8396.

'Negro' or 'person of colour' every one possessing any Negro blood, but the statute concerning marriage only applies to persons with Negro blood to the third generation.[37] The only other State to which reference need be made is Georgia. Before 1927 a coloured person was defined as one possessing one-eighth or more Negro blood,[38] but in 1927[39] the definition was changed to cover everybody possessing any ascertainable trace of Negro blood.[40] In February, 1950, it was announced that doctors in Atlanta, Georgia, found that a white woman patient required blood belonging to the 'CC' group. This is apparently a rare blood-group most commonly met in Australian aborigines, and an appeal for the necessary blood was sent to Australia.[41] It is interesting to speculate whether this known infusion of 'coloured' blood will render the patient coloured in the eyes of the law.

It is not only State courts and State legislatures that are inconsistent in their definitions of colour. Even the United States Supreme Court is not above contradicting itself. Two cases dealing with naturalisation applications by coloured persons clearly illustrate our point. By the Naturalisation Act, 1790,[42] it was provided that naturalisation was open to all 'free white' aliens under specified conditions. By the Act of 1870[43] Negroes were also made eligible. Although lower courts had held that members of the Malayan and Mongolian races were eligible for naturalisation the matter did not come before the Supreme Court until the *Ozawa Case*.[44] It was admitted that the applicant, a Japanese citizen, possessed all the requisite qualifications, but the Supreme Court held unanimously that he was not eligible. It was contended that when the Act of 1790 was drafted its framers only intended to refer to white slaves, Negroes and Indians. The Court, however, pointed out that the Act did not provide for the exclusion of these persons, but intended to confer a privilege on those who were known to be white, and as the Act was silent as regards Japanese these could not be included.

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[37] *Ibid.*, s. 8409.
[38] Ga. Code Ann., 1926, s. 2177.
[39] Ga. Laws, 1927, p. 272.
[40] These and other definitions may be found in Mangum, *op. cit.*, Chap. 1.
[41] *News Chronicle*, February 13, 1950.
[42] (1790) 1 Stat. L. 103.
[43] (1870) 16 Stat. L. 7425.
[44] *Takao Ozawa* v. *United States* (1922) 260 U.S. 178.

The court rejected the test of colour: 'Manifestly, the test afforded by the mere colour of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blonde to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the colour test alone would result in a confused overlapping of races and a gradual merging of one into the other without any practical line of separation. . . . The federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race'.[45] A few months after this decision had been rendered the Court was faced with an application for naturalisation by a Caucasian who happened to be a high-caste Hindu of full Indian blood. In the *Thind Case*[46] the Supreme Court rejected the test of race and applied that of colour: 'The term "race" is one which . . . must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from one remote common ancestor. . . . The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. . . . What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellant belongs'.[47] Consequent upon this decision a certificate of naturalisation was cancelled where the alien claimed that although he was a high-caste Hindu he was a full-blooded Arabian.[48] This was in 1925, but in 1944 the Massachusetts District Court held that an Arab, born of Arab parents in Arabia, was white 'in the understanding of the common man' and eligible for naturalisation.[49]

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[45] At p. 197.

[46] *United States* v. *Bhagat Singh Thind* (1923) 261 U.S. 204.

[47] At pp. 209, 213, 214.

[48] *United States* v. *Ali* (1925) 7 F. (2d) 728.

[49] *Ex parte Mohriez* (1944) 54 F. Supp. 941.

THE RIGHT TO MARRY

There is no human relationship more intimate and more fundamental than marriage and Article 16 of the Universal Declaration of Human Rights provides that 'Men and women . . . without any limitation due to race, nationality or religion, have the right to marry and found a family'. At its third session the General Assembly of the United Nations adopted a resolution [50] condemning as a breach of human rights the Russian refusal to allow Russian women to leave the Soviet Union to join their alien husbands abroad. Australia, the United Kingdom and the United States supported this resolution, but the Union of South Africa abstained.

The case of the Russian wives has become a *cause célèbre*, but the world is rather less vociferous about the somewhat similar policy applied in Australia. In March, 1948, Mr. Calwell, then Australian Minister of Immigration, announced that no Japanese wives or children of Australian servicemen would be allowed into Australia.[51] In some ways this is a graver denial of human rights than the Russian case, for the Soviet Union was refusing to allow Soviet nationals to depart, while Australia was refusing to admit Australian nationals into Australia. At the time he made this statement Mr. Calwell indicated that the policy of exclusion was based on the enemy origin of the women in question, but that this was merely a cloak for a colour policy soon became evident. In April, 1948, expulsion orders were issued to the Chinese wife and stepdaughter of an Englishman who had come as evacuees from Malaya in 1942; to the Tongan born, and therefore British protected, wife and two daughters of a British born husband; and to a Negro American [52] boxer who had lived in Australia for many years, had married an Australian girl and had two children.[53] About a year later Mr. Calwell attempted to expel an Indonesian woman who had been brought to Australia with her Dutch husband during the Malayan campaign. She had a child in Australia and her husband was killed in Dutch service. After his death she married an Australian citizen and thereby acquired British nationality. By a majority the High Court held she could not be expelled.[54] Almost immediately Mr. Calwell announced that the Immigration Act would be amended, for the 'decision in the *O'Keefe Case* goes far beyond the question of the repatriation of a single Indonesian family. It knocks down one of the main pillars on which the White Australian policy has firmly rested since 1901. . . . There will be no quota system for Asiatics, no appeasement . . .'.[55] The change in government in Australia may well result in the introduction of a more liberal policy, for each of these expulsion orders met with protests from the Opposition.[56]

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[50] No. 285 (3), May 25, 1949.

[51] *Sydney Morning Herald,* March 10, 1948; *Evening Standard* (London), March 9, 1948.

[52] Apparently, the persons concerned prefer to be known as 'Negro Americans' rather than 'American Negroes', Stokes, *Progress in Negro Status and Race Relations, 1911–1946* (35 Year Report of the Phelps-Stokes Fund), 1948, p. 39.

[53] *The Times* newspaper, April 17, 1948.

There is no such derogation from marriage rights in the United Kingdom nor in the British colonial territories. Colonial policy, however, tends strongly to discourage mixed marriages.[57]

The British Government became involved in problems concerning miscegenation in the latter part of 1949.

Under the Order in Council of 1891,[57a] which established the Protectorate over Bechuanaland, and the Bechuanaland Protectorate Native Administration Proclamation, 1943,[57b] it was provided that Native chiefs should be designated by the assembled tribe in accordance with tribal custom. The decision of the tribe was not to be conclusive, but could be disregarded by His Majesty's Government.

In 1948, Seretse Khama, the chieftain of the Bamangwato tribe, married an English girl who returned with him to Africa intending to live in the Native reserve. The marriage originally met with criticism in the tribe, but this was eventually overcome. Nevertheless, the British Government decided not to confirm Seretse as chief and to exclude him and his wife from the Protectorate for a period of five years. It must not be thought that the Seretse Khama case merely raised the question of a mixed marriage, for complex problems of tribal law and custom were involved. Strong opposition to the marriage and to the presence of Seretse's white wife in Africa came from the white population of the Union and of Southern Rhodesia, but it was officially denied that any representations were received from the Union or from Southern Rhodesia, or that the matter had been affected in any way by considerations based on the colour bar.[57c]

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[54] *O'Keefe* v. *Calwell,* decided March 18, 1949, not yet reported.

[55] *The Times* newspaper, March 24, 1949.

[56] *Ibid.,* April 17, 1948.

[57] Hodson, 'Seretse Khama and the Colour Bar' (1950), 43 *The Listener,* p. 543 at p. 544.

[57a] *Statutory Rules and Orders, Revised,* 1903, p. 109; 83 B.F.S.P., 1890–1891, p. 809; 84 *ibid.,* 1891–1892, p. 828.

[57b] Bechuanaland Proclamation, No. 32, 1943.

A somewhat similar situation arose in India. According to an *Extraordinary Gazette* published in March, 1950, the President of India permitted the Maharajah of Indore to exclude his Eurasian son from the succession in favour of his, younger, Hindu daughter.[57d]

Another form of legal restriction upon marriage is that which forbids any marriage between white and coloured persons. As we have seen in connection with the definition of colour, American States differ in their approach to miscegenation. Thus Indiana forbids marriages between white persons and those possessing one-eighth or more Negro blood,[58] while Oregon is more liberal and only prohibits one-fourth Negro blood.[59] Mississippi,[60] on the other hand, applies the same rule as Indiana, with the result that in 1948 an ex-serviceman who had served in the United States army for three years as a white man was sentenced to five years' imprisonment for marrying a white girl.[61] It is not only marriage with Negroes that is forbidden in certain of the United States. Fifteen States have legislation forbidding marriage between those of Caucasian and Mongolian race; ten between whites and Malays; five between whites and Indians; Arizona forbids marriage with Hindus, and Georgia and Virginia with Asiatic Indians. Even with respect to the law against miscegenation colour prejudice exists, for, generally speaking, no attempt is made to 'protect', as it is called, the purity of the coloured races who are usually allowed to intermarry, although Louisiana and Indiana forbid the marriage of Indians and Negroes, and Maryland that between Negroes and Malays.[62] Despite the miscegenation laws, illicit, unpunished relations between white men and black women are still fairly common, and this reality has given rise to the strong Negro indictment: 'The rape which your gentlemen have done against helpless black women in defiance of your own laws is written on the foreheads of two millions of mulattoes, and written in ineffaceable blood'.[63]

[57c] Cmd. 7193 (1950).

[57d] *News Chronicle,* March 29, 1950.

[58] Ind. Stat. Ann., 1933, ss. 44–104.

[59] Ore. Code Ann., 1930, ss. 14–840.

[60] Miss. Code Ann., 1930, s. 2361.

[61] *The Times* newspaper, December 21, 1948.

[62] Mangum, *op. cit.,* pp. 253–254.

Before 1949 there was no anti-miscegenation law in the Union of South Africa. Until the Immorality Act, 1927, no attempt was made to control white-coloured relationships. This Act prohibited extra-marital intercourse between Europeans and Africans and led to an increase in the number of registered unions. In 1927 and 1928 there were sixty-four and forty-two respectively producing coloured offspring, but by 1936 the number had dropped to six. In 1945 there were 184 marriages between Europeans and non-Europeans, including Natives, Coloureds and Asiatics.[64] Only in Transvaal was a mixed marriage impossible. This was not because the law forbade such marriages, but because the law only made provision for marriages between white persons[65] or between coloured persons.[66] For this purpose coloured persons were all those who were not white,[67] so that marriage between Natives, Coloureds and Asiatics was possible. Now, however, no further marriages between Europeans and non-Europeans may be contracted. By the Prohibition of Mixed Marriages Act, 1949,[68] no future marriage between a European and a non-European may be solemnized, and the marriage officer who performs such a marriage is also regarded as a lawbreaker.[69] Under the Immorality Amendment Bill, which was passed by the House of Assembly in March, 1950, it is intended to take the matter even further. It is the purpose of this legislation to prohibit extra-marital intercourse between Europeans and coloured persons. This means that in future all relations between the races will be completely illegal. During the debate it was pointed out that from thirty-five to a hundred prosecutions are brought annually under the 1927 Immorality Act.[69a]

[63] Du Bois, *The Souls of Black Folk,* 1924, p. 106.

[64] *Handbook on Race Relations in South Africa, loc. cit.,* note 21 above, pp. 10–12.

[65] Marriage Ordinance Law, No. 3 of 1871.

[66] Marriage of Coloured Persons Law, No. 3 of 1897.

[67] Kahn, 'Notes on South African Private International Law', 3 *International Law Quarterly,* 1950, p. 91.

[68] Act No. 55 of 1949. Some of the problems inherent in the operation of this Act are discussed by Kahn, *loc. cit.*

[69] See, for example, *The Observer,* March 19, 1950.

[69a] *News Chronicle,* March 4, 1950.

Perhaps far more discriminatory than the law forbidding mixed marriages is the rule that legal disputes between Europeans and Africans cannot be heard in the Native Courts, and that in such cases African customs cannot be enforced. Thus the Native Courts would recognise a customary union, and would allow a widow to recover damages in respect of the death of her husband caused negligently by an African motorist. In *Mokwena* v. *Laub*,[70] however, such a widow was unable to recover against a negligent European driver, the customary union not being recognised as a legal marriage.[71]

THE RIGHT TO EDUCATION

According to the Preamble of the UNESCO Constitution,[72] 'since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed'. It is not surprising to find, therefore, that Article 26 of the Universal Declaration of Human Rights proclaims that 'every one has the right to education'. Let us examine how far this right is enjoyed without distinction as to colour.

The history of education in South Africa from the point of view of equality is sorry indeed. No attempt was made to enforce any colour bar in schools until government schools were introduced to anglicise the Dutch-speaking burghers.[73] Today, however, any mixing in the schools would be considered unusual.[74] From 1855 to 1862 Native education was controlled by the Aborigines Fund which spent an average sum of £7,000 a year at a time when the average expenditure on European education was only a little over £10,000. In 1865 the Aborigines' schools were placed under the Education Department and expenditure fell.[75] In 1934–1935 Native education was costing about £600,000 and European £8,500,000, while in 1946–1947 expenditure on Native education had risen to £2,500,000 and that for Europeans to over £20,000,000.[76] In connection with miscegenation in the United States it was seen that examples of what could only be described as 'colour within colour' were not unknown. A similar principle is evident in connection with State-aided coloured education in South Africa. Thus, in 1946 there was only one State-aided school for Coloured pupils in Transvaal, although there were two for Chinese pupils.[77]

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[70] [1943] T.P.D., Part ii, 63.
[71] *Handbook, op. cit.*, p. 57.
[72] Cmd. 6963 (1946).
[73] *Handbook, op. cit.*, p. 349.
[74] *Ibid.*, p. 659.
[75] *Ibid.*, pp. 350–351.
[76] Walker, *Kaffirs Are Lively*, 1948, p. 182. The *Handbook* gives slightly lower figures than does Miss Walker for Native education in 1934 and 1946, p. 358.

Another instance of discrimination in education in South Africa relates to university facilities for coloured students. The South African Native College was established in 1916 and is open to Coloured and Asiatic as well as Native students. It has no facilities for studying law or medicine, although it provides a course in medical aid and a special preparatory course for those students who wish to compete for the five Native medical scholarships available at Witwatersrand University. At Witwatersrand and Cape Town universities Native students are admitted to classes, while Natal University College holds special classes for non-Europeans in Durban. In 1946 there were only 329 Natives attending university institutions.[78] The official policy of segregation in the universities has led to discrimination on other levels of university life. In 1946 the National Union of South African Students opened its ranks to students of the Native College with the result that the Afrikaans-speaking universities formed their own union.[79] Even the Boy Scouts' Association is closed to Natives,[80] although this is not the case with the Girl Guides which maintains separate troops.[81]

In the United States, at least in the South, segregation between white and coloured students is well-nigh complete.[82] Seventeen States possess legislation segregating the races at all levels of education, while five which do not provide segregated schools by their constitutions do have provisions for separate schools in certain areas.[83] In addition to these States there is legal segregation in the schools in the District of Columbia. The legally enjoined colour prejudice in Washington is so far-reaching in fact[84] that Dr. Bunche, formerly the United Nations acting mediator for Palestine, declined to accept an appointment as United States Assistant Secretary of State for the Near East and African Affairs as 'he had no wish to expose his family to "the Jim Crow atmosphere of Washington", where the colour ban against Negroes is widely exercised'.[85]

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[77] *Handbook, op. cit.,* p. 356
[78] *Ibid.,* pp. 372–374.
[79] *Ibid.,* p. 660.
[80] *Ibid.,* p. 661.
[81] *Ibid.,* p. 664.
[82] Johnson, *Patterns of Racial Segregation,* 1944, Chap. 8.
[83] *Ibid.,* p. 178.

In connection with the definition of colour it was seen that in the United States it is not only the Negro who suffers from discrimination. Not only are those of Mongolian race unable to become naturalised, they are also unable to attend white schools. In Mississippi Chinese children were directed to the coloured schools. This action was contested, but in *Rice* v. *Gong Lum*[86] the State Court sustained it, pointing out that all who are not white are coloured, and a Chinese is not white. This decision was upheld by the Supreme Court of the United States,[87] which held that a State did not have to provide separate schools for all races merely because it had done so in the case of a particular race. It is difficult to see how this 'colour within colour' discrimination is in line with the principle of 'separate but equal' which is to be found in most of the legislation relating to segregation.[88]

That *equality* does not mean *identity* is clear from cases like *Cumming* v. *Board of Education*,[89] in which the Supreme Court held that a Georgia school board was maintaining 'substantial' equality in providing a high school for white children, while failing, for financial reasons, to provide similar facilities for sixty qualified Negro children. In case it should be thought that the number of students was too insignificant to warrant the provision of a separate school, it might be pointed out that in the *Gaines Case*[90] the Supreme Court held that the State of Missouri was obliged to provide an equal opportunity for white and Negro residents of the State to pursue courses in State-aided educational institutions. The State offered to pay for a Negro law student's education outside the State, but this was held to be inadequate, and Missouri opened a separate Negro law college, whose peak attendance was thirty-five, while in 1943 no students were enrolled.[91] Ostensibly, this decision is supposed to maintain the principle of 'separate but equal', but it would be interesting to know how the handful of Negro pupils, and particularly the one for whom the college was opened, enjoy equal games facilities with their white fellow-students. Similar inequality is evident if the sums expended on education are examined. In seven southern States with segregated schools the average *per capita* expenditure for Negro students in 1944–1945 was $32.46, while for white students it was $73.67. Similarly the value of school property in eight such States in the same year was $52.40 *per* Negro student and $224.08 for each white student.[92]

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[84] *To Secure These Rights*, *op. cit.*, note 18 above, pp. 87–95.
[85] *The Times* newspaper, June 3, 1949.
[86] (1925) 139 Miss. 760.
[87] *Gong Lum* v. *Rice* (1927) 275 U.S. 78.
[88] Myrdal., *op. cit.*, p. 581.
[89] (1899) 175 U.S. 528.
[90] *State of Missouri ex rel. Gaines* v. *Canada* (1938) 305 U.S. 337.

It is not only in connection with education that we find that equality is not synonymous with identity. Thus in *Louisville and N.R.R.* v. *Commonwealth*[93] the Kentucky Court did not consider it incompatible with equality that the railway coaches provided for white passengers possessed separate toilets for men and women, while the 'Jim Crow' car only had one for the use of both sexes.

The whole principle of 'separate but equal' is now being contested before the Supreme Court, which is seised of two cases seeking to establish the right of Negro students to attend the ordinary universities.[94] When deciding these cases the court might well bear in mind the statement of the President's Committee on Human Rights: 'The "separate but equal" policy . . . recognises Negroes as citizens and as intelligent human beings entitled to enjoy the status accorded to the individual in our American heritage of freedom. It theoretically gives them access to all the rights, privileges and services of a civilised, democratic society. On the other hand, it brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people'.[95] Better still it might refer to the Advisory Opinion of the Permanent Court of International Justice on the *Minority Schools in Albania*. The court pointed out that 'it is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality. . . . The equality between members of the majority and of the minority must be an effective, genuine equality. . . . (It means) that the majority shall not be given a privileged situation as compared with the minority',[96] for 'there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.[97]

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[91] Wheildon, 'Negro Segregation', 11 *Editorial Research Reports,* 1947, p. 822.

[92] *Ibid.,* p. 825.

[93] (1914) 160 Ky. 769.

[94] *In the Shadow of Fear,* published by the American Civil Liberties Union, August 1949, p. 64.

[95] *To Secure These Rights, op. cit.,* p. 79.

THE RIGHT TO WORK

In time of peace perhaps the most fundamental right a man can possess is the right to work, and this right is expressly recognised in Article 23 of the Universal Declaration of Human Rights. In ~~South~~ Africa, however, it would be a travesty of the truth to ~~pretend~~ that there is equality from this point of view. Where the professions are concerned there is, generally speaking, no legal bar, although in 1936 of 9,152 doctors, lawyers, dentists, chemists, architects and engineers, 9,090 were European, twenty-five Asiatic, twenty-three Coloured and fourteen African. In many cases hospital training is only available for Europeans, and there are no facilities for training non-European dentists.[98]

Where industry is concerned colour prejudice is legally enforced. Under the Native Labour Regulation Act[99] breach of contract by a 'Native labourer' is criminal. This means that unless the Native is on daily rates it is illegal for him to participate in any strike. Most of the Native labourers work in the mines, and by the Mines and Works Act[1] the Governor-General is authorised to make regulations concerning the issue of certificates of competency in skilled occupations in mining and engineering. By an amending statute promulgated in 1926, however, the grant of such certificates is limited to 'Europeans, Cape Coloureds, and Mauritius Creoles or St. Helena persons'.[2] Thus, Native mineworkers are prevented by law from doing much of the better paid work. There are many other similar

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[96] 1935, Series A/B, 64, pp. 19–20.
[97] *German Settlers in Poland,* 1923, Series B, No. 6, p. 24.
[98] *Handbook, op. cit.,* pp. 123–124.
[99] No. 15 of 1911.
[1] No. 12 of 1911.
[2] *Handbook, op. cit.,* p. 147.

Acts discriminating against Native labour, but there is only need to refer to the Apprenticeship Act, 1944.[3] This Act contains no colour bar but its effect would be little different if it did. It lays down a minimum educational standard that is, in the main, far too high for non-Europeans,[4] while facilities for the technical training that is compulsory for all apprentices are not usually available for non-Europeans.

It is often said that in the absence of such legislative measures white labour would discriminate against coloured workers. That this is not always so has been shown in South Africa in connection with trade union activities. Not all the unions have rules excluding non-Europeans, but 'the government stopped any potential development of inter-racial co-operation by issuing a circular that European trade unions could not include pass-bearing Africans[5] in their memberships'.[6] The Sweet Workers' Union was open to all races, but a legal decision compelled it to close its ranks to Africans, while the South African Typographical Union had an African section, but was compelled by the Department of Labour to form this section into an independent union, although all its administrative work is done through the offices of the Typographical Union.[7]

In the United States discrimination in so far as labour is concerned tends to be left in private hands,[8] although legislation has sometimes been enacted to regulate the situation when segregation has been introduced. Such legislation usually requires separate stairways, drinking fountains, entrances and even separate pay windows.[9] Although we have said that labour segregation tends to be of a private kind, government agencies have not hesitated to put it into practice,[10] and particularly was this so in Washington.[11] Since the War, and largely due to the activities of the Fair Employment Practice Committee, this discrimination has tended to diminish. In February, 1950, however, the House of Representatives refused to accept a measure enabling the Fair Employment Practice Committee to enforce its decisions.[12] In connection with this aspect of the problem it should not be forgotten that there are very many occupations in the United States that are only open to citizens, and are closed to all aliens regardless of colour.[13]

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[3] No. 37 of 1944.

[4] *Handbook, op. cit.*, p. 151; Stent, 'Colour Problems of South Africa', 2 *Year Book of World Affairs*, 1948, p. 70, at pp. 80–81.

[5] See below under 'Equality Before the Law'.

[6] *Handbook, op. cit.*, p. 662.

[7] *Ibid.*, p. 663.

[8] Johnson, *op. cit.*, note 80 above, Chaps. 2–5.

[9] Mangum, *op. cit.*, note 1 above, pp. 174–175.

[10] *To Secure These Rights, op. cit.*, pp. 58–59.

[11] *Ibid.*, pp. 92–93.

Discrimination by American trade unions is not legally enjoined, although it exists on a fairly extensive scale.[14] This situation is now improving somewhat, and both New York and Pennsylvania have introduced legislation to combat the colour bar in trade unions.[15]

It is not only the Union of South Africa and the United States that tolerate colour discrimination in the field of labour. In 1921 British Columbia passed a statute[16] making the employment of Chinese or Japanese labour sufficient reason to revoke a licence to cut timber on Crown lands. This statute was considered by the Judicial Committee of the Privy Council in 1923.[17] On the face of it, the statute was incompatible with the Anglo-Japanese treaty of 1911,[18] but the Council sustained the cancellation of the licence as it was not confined to Japanese but included Chinese too.

Discrimination in British Columbia is not confined to Chinese and Japanese, nor to the field of labour. Canadian Indians do not enjoy full rights of citizenship. They may vote and be elected to the Legislature, but 'the position of the elected Indian . . . presents an anomaly. . . . The elected Indian as long as he is within the legislative chamber enjoys all the privileges of a member, but as soon as he leaves the floor of the House he becomes an Indian again. That means he is not eligible for the old age pension, he cannot purchase alcoholic spirits and is in a special category under social welfare laws. He is a full citizen inside the House but far from it outside'.[18a]

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[12] *The Times* newspaper, February 24, 1950.

[13] Konvitz, *The Alien and the Asiatic in American Law,* 1946, Chap. 6, especially pp. 190–207.

[14] Myrdal, *op. cit.,* pp. 1298–1299.

[15] *Ibid.,* p. 1300.

[16] 11 Geo. 5, c. 49.

[17] *Brooks-Bidlake and Whittall, Ltd.* v. *A.G. for British Columbia* [1923] A.C. 450.

[18] *Handbook of Commercial Treaties,* 1931, p. 384.

[18a] *The Times* newspaper, March 13, 1950.

THE RIGHT TO SERVE

We have seen that there is no equal right to work in time of peace; let us now see whether the situation is any different in time of war. This problem was only important in the United States, and in 1942 the Federal Security Agency stated that 'over 500,000 Negroes who should be utilised for war production are now idle because of the discriminatory hiring practices of war industries'.[19] In some cases it was not the attitude of the employer that was to blame. The Naval Yard at Miami, Florida, could not employ Negroes on skilled or semi-skilled tasks as a city ordinance forbade their employment on such work outside the Negro section of the city.[20] A somewhat similar situation existed at San Diego. The Consolidated Aircraft Corporation employed no Negroes, and the local education authority ruled that no Negro could take a vocational course without first obtaining a letter from a local employer saying he would be employed.[21] This matter improved after President Roosevelt, threatened with a Negro march on Washington, issued an Executive Order on the subject.[22]

Although coloured people in both South Africa and the United States have suffered grave discrimination in every way, they have never been slow in offering their services in the armed forces in time of war.[23] Their record of service in both wars leaves little of which they need be ashamed, but the same cannot be said of the treatment they have received from their governments. Sir Arthur Salter has disclosed that during the 1918 armistice discussions of the Allied Maritime Transport Council and Executive 'France was able to make a strong though modest claim for the repatriation of her Colonial troops and a very delicate question arose as to whether, other things equal, coloured troops had as strong a claim for early repatriation as white troops'.[24] There is no evidence of any such delicate discussions having taken place in 1945.

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[19] *The Labor Market,* June 1942, p. 10.
[20] Myrdal, *op. cit.,* p. 413.
[21] Johnson, *op. cit.,* p. 107.
[22] *Ibid.,* p. 111.
[23] During the war there was a great deal of discrimination practised with regard to Negroes in the American Forces. Only a few units were open to them and very few of them received commissions (*To Secure These Rights, op. cit.,* pp. 40–47). Now, however, a policy of complete equality of opportunity in all Services has been introduced (private letter from E. W. Kenworthy, Executive Secretary, The President's Committee on Equality of Treatment and Opportunity in the Armed Services). In South Africa coloured persons served in the S.A. Naval Service and the Cape Corps, and Natives in the Native Military Corps. In July 1948, it was announced that the Native Military Corps would be disbanded (*Handbook, op. cit.,* pp. 538–555, 739–740).

By her War Pensions Acts[25] South Africa has provided for the payment of pensions to European, Coloured and Indian ex-servicemen of the Boer and two World Wars. No provision is made for the payment of pensions to Natives who may, however, receive assistance from a vote of the Department of Native Affairs.[26]

Many countries have legislation whereby aliens who serve in their forces are able to become naturalised although they do not fulfil all the normal requirements. Such legislation exists in the United States, but in *Toyota's Case*[27] the Supreme Court held that neither the statute of 1918[27a] which referred to 'any alien', nor that of 1919[27b] which spoke of 'any person of foreign birth', intended to amend the concept of colour introduced in 1790, and therefore a Japanese was not eligible for naturalisation. It will be interesting to see whether the similar act of 1948[28] will be interpreted in the same way.

EQUALITY BEFORE THE LAW

At the beginning of this paper it was pointed out that consideration of the colour problem would be confined to those issues in which the law enforces or supports prejudice. For this reason all that has been said so far may be regarded as evidence to prove that there is—in certain places at least—no equality before the law for white and coloured. It is therefore only necessary to draw attention to one or two additional points.

In his poem *The Task,* published in 1785, William Cowper wrote:—

> 'He finds his fellow guilty of a skin
> Not coloured like his own, and having power
> T'enforce the wrong, for such a worthy cause
> Dooms and devotes him as his lawful prey'.[29]

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[24] *Allied Shipping Control,* 1921, p. 225.
[25] No. 45 of 1941 and No. 44 of 1942.
[26] *Handbook, op. cit.,* p. 424.
[27] *Toyota* v. *United States* (1924) 268 U.S. 402.
[27a] (1918) 40 Stat. 542.
[27b] (1919) 41 Stat. 222.
[28] United States Information Service, *Daily Wireless Bulletin,* No. 713, June 22, 1948.
[29] Book 2, lines 12–16 (*Poetical Works of William Cowper,* edited Benham, 1870, p. 199).

One might have thought that the abolition of the slave trade throughout the British colonies in the early part of the nineteenth century[30] and the abolition of slavery in the United States after the Civil War would have rendered Cowper's lines purely of historical interest. It cannot be denied that Great Britain sought to achieve this on an international scale. Thus in 1833 Palmerston protested against Brazilian legislation which was directed at returning all Negro slaves to Africa. The British Government feared that such slaves would be killed by the slavers during the return journey, or by African tribesmen should they ever reach that continent. 'On the ground of humanity alone His Majesty's Government feel that they would be justified in pressing this subject upon the Brazilian Government', and they therefore called for the repeal of the legislation.[31] The humanitarianism inherent in this protest is also evident in Article 4 of the Universal Declaration of Human Rights: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'.

Unfortunately, it cannot be said that involuntary servitude of coloured persons is unknown in the British Commonwealth or the United States of America. In various parts of the Empire indentured labour still exists and, although the conditions might savour of slavery or forced labour,[32] we need not consider them in any detail for they are part and parcel of colonial rather than colour policy. In South Africa the situation is much more serious. As early as the South Africa Act, 1909,[33] mention is made of the pass laws, but no attempt is made to define them. The result is that Natives wishing to move from one place to another require a signed pass for the purpose. The pass system has proved so useful that today, generally speaking, if a Native wishes to keep on the right side of the law he needs to carry between six and twelve passes on his person,[34] for if called upon he has to show his documents and prison may be the consequence of failure to produce them. The pass laws are so unpopular that attempts to enforce them often result in rioting, as happened in February, 1950.

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[30] See Schwarzenberger, 'Human Rights in British State Practice', 1 *Current Legal Problems*, 1948, p. 152, at p. 157.

[31] 22 B.F.S.P., 1833–1834, p. 74 (cited in Schwarzenberger, 'The Problem of an International Criminal Law', this volume, p. 263 below, at p. 280).

[32] See Mair, *op. cit.*, note 10 above, Chaps. 6 and 7.

[33] 9 Edw. 7, c. 9, Schedule, s. 18.

[34] *Handbook, op. cit.*, Chap. 12.

The Minister of Native Affairs in 1944 described the purpose of the pass and contract registration laws as being 'to afford protection to a large section of the Native community who are still definitely unsophisticated and need help and guidance when they impinge on the very complicated machinery of a large modern city and where they are so often imposed upon by unscrupulous employers and so often exploited'.[35] Apparently Native women are not unsophisticated for they are exempt from registration.[36] In reality the purpose of these laws is the provision of cheap farm labour. As has already been seen, European trade unions are forbidden to co-operate with pass-bearing Natives, while 'once convicted of being passless, (the Natives) have the choice to serve their sentence or voluntarily to accept service on the farms. If they choose the latter, the prosecution is withdrawn'.[37] The service on the farms, however, is not always voluntary. In September, 1949, Mr. Swart, the Minister of Justice of the Orange Free State, opened a new jail at Leslie, Eastern Transvaal. This jail was built by the Leslie Farmers' Association Labour Supply Company which has fifty shareholders, each holding shares worth £40. The jail holds 300 prisoners who are hired out to the shareholders at one shilling and ninepence per day.[38] These prisoners are transported from jail to farm padlocked in wire cages, and even local inhabitants have not hesitated to use the word 'slavery'.[39]

In the United States, peonage, described as 'a condition of compulsory service based on the indebtedness of the victim, which indebtedness is the cord by which he is bound to the person to whom he owes the obligation',[40] is illegal. Nevertheless, according to Myrdal, white employers when short of labour often request the sheriff to enforce the vagrancy laws, and in Florida, for example, these would apply to 'persons who neglect their calling, or are without reasonably continuous employment or regular income, and who have not sufficient property to sustain them'. Formerly the employers rented the prisoners direct from the State, 'now they make a deal with the Negro defendant to pay his fine if he will work a certain number of days—fewer than the number he would have to expend in jail'.[41]

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[35] *House of Assembly Debates,* 1944, col. 3105.

[36] *Handbook,* p. 289.

[37] Public Prosecutor De Beer at Johannesburg Native Commissioners' Court, reported in *Bantu World,* August 13, 1949. See also *Handbook, op. cit.,* p. 106.

[38] *News Chronicle,* September 3, 1949; *New Statesman and Nation,* October 8, 1949.

[39] *Cape Argus* (Johannesburg), November 28, 1949.

[40] Mangum, *op. cit.,* pp. 164–165; *To Secure These Rights, op. cit.,* pp. 29–30.

There is no need to devote much time to the inequality experienced by the coloured man in his dealings with the courts. A few examples will suffice. Thus in South Africa 'it is rare for a European to be convicted of murder when the victim is a non-European: he is either acquitted, or found guilty of culpable homicide or assault. In consequence and because of the general reluctance to execute a European, no European is ever hanged for the murder of a non-European. A non-European convicted of murdering a European, on the other hand, is usually hanged. . . . Only non-Europeans are executed for rape, and then only if the complainant is a European'.[42]

In a case concerning the killing of Africans in 1942 the two European prisoners were sentenced to ten strokes with a light cane, while in another the sentence was a £10 fine or one month's imprisonment. In 1926 a white man who raped a 15 year old Native girl received eighteen months with hard labour, while a Native found guilty of assault with intent to commit rape was sentenced to seven years with hard labour and seven lashes. A year earlier a white man guilty of the indecent assault of two Native girls was sentenced to one month's imprisonment, while a Native sentenced for having sexual relations with a white woman with her consent received twelve months and five lashes.[43]

In the Southern States of the United States the situation is similar. 'As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. . . . The sentences for even major crimes are ordinarily reduced when the victim is another Negro. . . . It is a rare case indeed in which a Negro who has murdered a Negro received the extreme penalty . . . regardless of the facts. . . . The punishment as between Negro and Negro, as distinguished from white versus white, or Negro versus white victim, is decidedly different and clearly shows the racial approach to the question. . . . For offences which involve any actual or potential danger to whites, Negroes are punished more severely than whites. . . . Particularly the lower courts, which work on a fee system, are inclined to fine Negro defendants heavily without giving them much chance to explain their case '.[44]

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[41] Myrdal, *op. cit.*, pp. 551, 1344–1345.

[42] *Handbook, op. cit.*, p. 99.

[43] These and other cases are mentioned by Walker, *op. cit.*, note 76 above, Chap. 11.

When American citizens residing abroad have been murdered and the local authorities have failed to punish the assailants, the United States has not been slow to protest and demand reparation.[45] Her standards of justice in connection with the lynching of Negroes have not, however, been as high. It was not until February 18, 1936, at Raleigh, North Carolina, that the first execution of a white man for lynching a Negro took place.[46] In July, 1946, four Negroes were murdered in Georgia by unmasked white men; the grand jury refused to indict. In August there was evidence that a deputy sheriff in Louisiana had helped a mob put two young Negro prisoners into a car. One of the Negroes was killed, and five men including the deputy were tried and acquitted. All previous lynching trials pale into insignificance when compared with that which took place at Greenville, South Carolina, in May, 1947. Thirty-one white men, of whom twenty-six had signed statements implicating themselves, were charged for lynching and were acquitted.[47]

Finally, two further instances of inequality before the law might be mentioned. Adultery is not a crime in South Africa, nevertheless by the Natal Native Code and the Natal Indian Immigration law it is, if committed by the Africans or Indians affected by these statutes.[48] It is well known that the American population consists to a large extent of alien immigrants, and these or their children often visit their countries of origin. Should a white American return to the United States the burden of proving him an alien rests on the Government,[49] but if he should be a Chinese it is for him to prove he is an American citizen,[50] and the Supreme Court has held that in such matters the decisions of the Government department are final.[51]

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[44] Myrdal, *op. cit.*, pp. 551, 1344.

[45] See, for example, *Neer Claim* (1926) against Mexico. (Green, *International Law Through the Cases*, 1950, No. 149.)

[46] Myrdal, *op. cit.*, p. 1345.

[47] *To Secure These Rights, op. cit.*, pp. 22–23. The Greenville case was described by Miss Rebecca West in an address to the Medico-Legal Society, 'Lynching Trials in America', 17 *The Medico-Legal Journal*, 1949, p. 90.

[48] *Handbook, op. cit.*, p. 79.

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No attempt has been made in this paper to suggest means of solving the inequalities that exist in connection with human rights and the colour problem. It is intended as a warning against too facile acceptance of the current illusions with regard to human rights. When human rights are denied at home, whatever the reason, they tend to become a mere ideology abroad. While every sympathy must be given to the criticisms of the countries of Eastern Europe for their denials of human rights in the political sense, the complainant countries must be reminded of the situation in their own territory, remembering that in *Kemp* v. *Rubin*[52] the New York Court pointed out that under the Charter of the United Nations these matters are within the domestic jurisdiction of the States concerned. So long as the western democracies tolerate discrimination by their own systems of law on account of colour, so long must their complaints regarding the conduct of others appear to be empty and hypocritical.

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[49] *Bilokumsky* v. *Tod* (1923) 263 U.S. 149.
[50] *Chin Bak Kan* v. *United States* (1901) 186 U.S. 193.
[51] *United States* v. *Ju Toy* (1905) 198 U.S. 253.
[52] See note 13 above.

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THE PROBLEM OF AN INTERNATIONAL CRIMINAL LAW

GEORG SCHWARZENBERGER

INTERNATIONAL lawyers—with the exception of those immunised by the atmospheric conditions prevailing in the legal departments of Foreign Offices—are prone to suffer from a professional disease against which other members of the legal profession are remarkably immune. They appear to be highly susceptible to current fashions in the realm of political ideology.

The reasons for this idiosyncrasy are not far to seek. The inherent weakness of international law in an overriding system of power politics; an understandable temptation to hide this state of affairs from oneself and others by means of elaborate images; the inflated position of doctrine among the law-determining agencies in this field; and a revivalist movement towards a new naturalism which lacks so conspicuously the innocence of mind of the early naturalists—all bear their measured share in producing the phenomenon of the evangelist international lawyer. When, therefore, there is a new *dernier cri,* such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all.

It may be asked whether there are no more urgent problems than that of an international criminal law with which international lawyers could occupy their time. Much is to be said for this view. It must not, however, be overlooked that, even in official quarters, this movement has received a modicum of hesitant support. Thus, by a Resolution of November 21, 1947, the General Assembly of the United Nations charged the Committee on Codification of International Law with the 'formulation of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal'. In the second part of this Resolution a direct link was established between the Nuremberg principles and international criminal law. The Committee—in the end, the International Law Commission—was asked to formulate these principles in the context of a general codification of offences against the peace and security of mankind or of an 'International Criminal Code'. During its Third Session of 1948, the General Assembly returned to the subject. By forty-one votes in favour, none against, and with six abstentions, it adopted a further Resolution. In it the conviction was expressed that 'in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law'. The Assembly asked the International Law Commission to 'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'. The Commission was further requested to 'pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice'.[1]

It may also be mentioned that in September, 1948, the Inter-Parliamentary Conference stated in the Preamble to a Resolution on Principles of International Morality that 'the Nuremberg Charter for the prosecution and punishment of the main war criminals has endowed international penal law with principles that are also worth codifying'.

Thus, the question of international criminal law has entered a formative stage in which it may claim to be a current legal problem.

I—THE SIX MEANINGS OF INTERNATIONAL CRIMINAL LAW

It would be unduly optimistic to assume that 'International Criminal Law' has now been established unequivocally as a technical term. It is used in at least six different meanings by those who consider international criminal law to form part of the existing law of nations.

(a) *International Criminal Law in the Meaning of the Territorial Scope of Municipal Criminal Law.* It follows from the principle of the independence of States that, to any extent to which subjects of international law are not limited by principles of international law, they are free to determine as they see fit the territorial scope of their municipal criminal laws. They may limit the scope of their criminal laws to acts committed in their own territories and territorial waters, on ships sailing under their own flag or on aeroplanes of their own nationality. They may, however, extend their criminal jurisdiction to acts committed by their own subjects or by foreigners abroad. In the words of the Permanent Court of International Justice in the *Lotus Case* (1927), 'all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State'.[2] For our purposes it is unnecessary to attempt to determine the exact point at which the claim of a State to extend the applicability of its own criminal law to acts of foreigners committed abroad amounts to a violation of the rights of other subjects of international law. What is important is to realise that there is a wide field in which the various systems of municipal criminal law claim concurrent or conflicting jurisdiction.

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[1] See further United Nations, International Law Commission. *The Charter and Judgment of the Nürnberg Tribunal,* 1949, p. 11 *et seq.*

In practice, the chaos that might result from such concurrent and conflicting claims is reduced to manageable proportions by one definite prohibitive rule of international law. In principle,[3] at least, the actual exercise of criminal jurisdiction in concrete instances must take place within a State's own territory or in places assimilated to it.[4]

Within these limits it is left to every system of municipal criminal law to determine for itself whether, and to what extent, it applies to crimes with a foreign element, that is to say, to crimes with a *locus delicti* abroad. In this respect, the situation is analogous to that in the field of private international law. International criminal law in this sense, a terminology widely accepted in nineteenth century Continental Doctrine,[5] belongs not to international but to municipal law. As in the case of rules of private international law, rules of conflict of criminal laws may, however, be incorporated into a treaty and thus become rules of international conventional law.[6]

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[2] Series A, No. 10, p. 20; cf. also *Naim Molvan* v. *Attorney-General for Palestine* [1948] A.C. 351.

[3] Exceptions may be based on special rules of international customary law, as, for instance, in the case of jurisdiction of belligerents regarding war crimes, of criminal jurisdiction over members of armed forces abroad in peace and war, or on treaties, such as capitulation treaties.

Conversely, rules of international law may exclude the exercise of local criminal jurisdiction, as in the case of foreigners enjoying diplomatic immunity.

[4] *L.c.* in note 2 above, p. 18.

(b) *International Criminal Law in the Meaning of Internationally Prescribed Municipal Criminal Law.* The term 'international criminal law' is used in a second meaning when it refers to instances in which a State is bound under international law to visit upon acts of individuals the sanctions of its own municipal criminal law. Obligations of this kind may arise from treaties or from duties of States under international customary law.

In the late Middle Ages it was customary among the princes of Christendom to bind themselves by reciprocal treaties to prevent and punish piracy or the spoilage of shipwreck. On the initiative of Great Britain, in the course of the nineteenth century, a number of bilateral and multilateral conventions were concluded, by which slave-trading was assimilated to piracy. Into the same category belong treaties such as the International Phylloxera Convention of September 17, 1878, the International Convention on the Traffic in Women of Full Age of October 11, 1933, or the Convention for the Regulation of Whaling of June 8, 1937.

To the extent to which such conventions impose a duty on

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[5] Already in their *collisio statutorum,* the Glossators and Postglossators dealt with the substance of the problem. The best work on the historical aspects of international criminal law is still H. Donnedieu de Vabres, *Introduction à l'Étude du Droit Pénal International,* 1922. Cf. also F. Meili, *Lehrbuch des Internationalen Strafrechts und Strafprozessrechts,* 1910, p. 25 *et seq.,* and J. Kohler, *Internationales Strafrecht,* 1917, p. 19 *et seq.*

For nineteenth century literature, cf. L. von Bar, *Das Internationale Privat-und Strafrecht,* 1892 ; W. von Rohland, *Das Internationale Strafrecht,* 1877 ; F. von Martens, *Völkerrecht,* 1883, Vol. 2, p. 358 *et seq.* ; J. B. Moore, *Report on Extraterritorial Crime and the Cutting Case,* 1887.

Among more recent works in this field, cf. M. Travers, *Le Droit Pénal International,* 1920–1922 (5 vols.), F. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International,* 1928, and the Harvard Research Draft on *Jurisdiction with Respect to Crime,* 29 A.J.I.L. 1935, Special Supplement, p. 435 *et seq.,* especially the exhaustive bibliography, p. 447 *et seq.*

[6] See, for instance, the Treaty on International Penal Law between Argentina, Bolivia, Paraguay, Peru and Uruguay of January 23, 1889 (18 Martens, *Nouveau Recueil Général des Traités* (2^{me} sér.), p. 432.

States to enact municipal criminal legislation or to punish certain acts committed by their subjects or within their territorial jurisdiction, such conventions may be said to prescribe municipal criminal law. If, however, States should fail to live up to their treaty obligations, they themselves do not commit any 'international crime', but are merely responsible for breach of their treaty obligations.

Similarly, international customary law may prescribe the existence of rules of municipal criminal law. Some of the crimes which, in his *Commentaries on the Laws of England,*[7] Blackstone described as offences against the law of nations are relevant instances. Actually, this terminology is of a much earlier date. In a Manifest of the English Parliament against the United Provinces of July 31, 1652, an attack on one of the English ambassadors in The Hague was branded as a crime '*contra omnium Gentium, immo ipsius humanitatis, Jura*'.[8]

Piracy is listed by Blackstone as the first of these offences. It will be more fully discussed under a subsequent heading.[9] The two other offences against the law of nations, which Blackstone enumerated, are violation of safe-conducts and infringement of the rights of ambassadors. These offences are not, however, crimes under international law. The law of nations merely bids States to do everything in their power to ensure the observance of rules of international law such as the inviolability of ambassadors, the immunity of subjects of enemy States under safe-conducts or the treatment of foreigners in accordance with the minimum standards of international law. In the case of attacks on foreign envoys or on nationals of other States, a State has fulfilled its own duties under international law when it provides for adequate protection of such foreigners by its police. If, nevertheless, outrages occur, it must do everything in its power to bring the guilty, whether civil servants or private citizens, to justice. It cannot plead the insufficiency of its own criminal law or the inadequacy of its administration of criminal justice. In this and other respects, international law prescribes certain minimum standards.[10] Yet again, when a State fails to live up to these standards, it does not commit an international crime. It becomes responsible for its own violation of rules of international customary law, that is to say, it has committed an international tort. Thus, these offences of individuals against the 'law of nations' are not crimes under international law, but offences against rules of internationally postulated municipal criminal law.

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[7] Book 4, Chap. 5. Cf. also below under 1 (d).

[8] J. de Dumont, *Corps Universel Diplomatique du Droit des Gens,* Vol. 6, Part 2, p. 28.

[9] See below under 1 (c).

[10] See further the present writer's *International Law,* Vol. 1, 1949, p. 236 *et seq.*

In the case of, for instance, municipal statutes of a penal character for the protection of the status of a country as a neutral power international law does not even require the protection of municipal criminal law. On their own, for their own convenience and in order to demonstrate their international bona fides, some States have enacted such statutes as the British Foreign Enlistment Acts of 1819 and 1870. It is left to each State to secure effectively the fulfilment of its own obligations under international law.

The situation is similar when, in the interest of good neighbourly and peaceful relations with other powers, States enact criminal legislation against acts likely to discredit the good repute of sovereigns and other dignitaries of foreign States, because such acts may endanger amicable political and commercial relations with other States.[11] At the most, such municipal criminal law is required by international comity as distinct from international law.

Offences against the law of nations in the meaning of rules of municipal criminal law which are postulated by international law or comity, do not constitute evidence for the existence of an international criminal law. States which fail to enact such statutes may, however, be liable for breach of treaty or for the commission of an international tort.

(c) *International Criminal Law in the Meaning of Internationally Authorised Municipal Criminal Law.* This is the proper place to discuss the examples which, so often, are adduced as evidence *par excellence* of the existence of international criminal law: piracy *jure gentium* and war crimes.

(i) *Piracy jure gentium.* On the basis of a multitude of treaties, two different principles have gradually grown into principles of international customary law.

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[11] See, for instance, *King* v. *Gordon* (1787—22 State Trials, 213); *King* v. *Vint* (1799—27 *ibid.*, 627; *King* v. *Peltier* (1803—28 How. State Trials, 530), and *Respublica* v. *De Longchamp* (1784) 1 Dal. 3.

The first is that every State is under an international obligation to suppress piracy within its own territorial jurisdiction. If a State should fail to do so or should associate itself persistently with piratical ventures, it would certainly violate this rule. It is liable for the commission of an international tort and, in an extreme case, may even forfeit its own international personality and be treated as an international outlaw.[12] To the extent to which, for the purpose of countering piracy, a State requires of necessity the assistance of its municipal criminal law, such law may be considered to be internationally prescribed.

In addition, there is the second rule which is summarised by the term piracy *jure gentium*. It means that, in the interest of the freedom of the seas, every State is authorised to assume jurisdiction on the high seas over pirate ships. If it does so it may mete out to pirates any condign punishment, including the death penalty. Yet the recognition of acts of piracy as 'constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country'.[13] The grant to States, under international law, of jurisdiction over pirates is an apparent exception to the principle of the freedom of the seas, according to which, in time of peace, States exercise on the high seas only jurisdiction over ships sailing under their own flag. The exception is, however, only apparent. Pirate ships are not under the protection of any subject of international law, but are *res nullius*, floating chattels which are not allocated to any subject of international law.

(ii) *War Crimes*. It is the purpose of the rules of warfare, as developed by the laws and customs of warfare and by international conventions, to draw the dividing line between legal and illegal forms of warfare. Every belligerent State is under an international duty to do everything in its power to ensure respect for the rules of warfare on the part of its armed forces and to punish such infractions as may occur. To this extent the law of war crimes embodies internationally prescribed rules of municipal criminal law. If members of armed forces observe these rules and happen to fall into the enemy's hands, they are only liable to detention as prisoners of war, but are immune from personal responsibility for hostile acts committed by them prior to captivity. If they have transgressed these rules, they are outside the protection granted by international law to ordinary prisoners of war. On the basis, however, of the general principles of law recognized by civilised nations, rules of international customary law have developed which limit the absolute discretion of enemy States with regard to war criminals. The enemy State may apply any punishment, including the death penalty, to such individuals. It must, nevertheless, grant them some kind of trial, however summary. Only in this way is it possible to establish whether a breach of the rules of warfare has been committed by the prisoner and, therefore, whether he falls under this extraordinary jurisdiction. Belligerents usually comply with this minimum requirement by providing for simplified proceedings in their own military courts and under their own municipal laws.[14] To consider the objects of such an internationally authorised extraordinary criminal procedure under municipal law as 'subjects of international duties'[15] or to regard war crimes—or espionage—as evidence of the existence of an international criminal law, requires a remarkable gift of abstraction from reality.

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[12] See further the present writer's *International Law and Totalitarian Lawlessness*, 1943, p. 82 *et seq.*

[13] In re *Piracy Jure Gentium* [1934] A.C. 586, at p. 589. See further the Harvard Research Draft on *Piracy* (26 A.J.I.L., 1932, Spec. Suppl., p. 739 *et seq.*).

The rules of international law both on piracy *jure gentium* and war crimes constitute prescriptions to States to suppress piracy within their own jurisdiction and to exercise proper control over their own armed forces, and an authorisation to other States to assume an extraordinary criminal jurisdiction under their own municipal law in the cases of piracy *jure gentium* and of war crimes committed prior to capture by the enemy.

(d) *International Criminal Law in the Meaning of Municipal Criminal Law Common to Civilised Nations.* In the Constitution of the United States the term 'offences against the law of nations' is used.[16] It covers acts which international law prescribes, or authorises, to be treated as criminal under the municipal law of the United States[17] and crimes which, owing to their general noxious character, are punishable in most civilised countries.[18] Again, such crimes can be described only in the loosest sense as offences against the law of nations. They fall into one of two categories.

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[14] See further S. Glueck, *War Criminals, Their Prosecution and Punishment,* 1944, and *l.c.* above in note 12, p. 57 *et seq.*

[15] H. Lauterpacht, *The Subjects of the Law of Nations,* 64 L.Q.R. (1948), p. 110 and Oppenheim's *International Law* (ed. by H. Lauterpacht), Vol. 1, 1948, p. 323, note 1.

[16] Article 1, section 8, cl. 10.

[17] *Ex parte* Quirin *et Al.* (1942) 317 U.S. 1.

If a State should fail to punish common offences against life, liberty or property, its criminal law is below the minimum standards of international law. In this case the home State of foreigners who suffer from such a state of affairs may hold such a State responsible for the commission of an international tort. Within these limits, a 'civilised' type of municipal criminal law is internationally prescribed.[19]

There is a second type of offence, such as the forgery of foreign coins or banknotes. Considerations of international comity, and consciousness of the reciprocity of favours in inter-State relations, may make it advisable for a State to make such acts punishable under its municipal criminal law. International customary law does not, however, impose any obligation on States to take such action. Conversely, nothing prevents States from voluntarily limiting their freedom of action by the conclusion of conventions to this effect. This was done, for instance, by the parties to the Convention for the Suppression of Counterfeiting Currency of May 1, 1929.

On closer examination, this type of offence against the law of nations dissolves into one of two categories. They either belong to the category of municipal criminal law which is prescribed by international law or they are principles of municipal criminal law which civilised States have *de facto* in common or consider it opportune to assimilate to a common standard by means of international conventions or by parallel municipal legislation.

(e) *International Criminal Law in the Meaning of International Co-operation in the Administration of Municipal Criminal Justice.* Those who use the term international criminal law in the first-mentioned meaning of the territorial scope of international criminal law, usually deal under this heading, too, with extradition treaties and other conventions by which States assist each other in the administration of criminal justice.

The *raison d'être* of such treaties is the territorial limitation of national sovereignty. Without international co-operation between States criminals could defy the municipal criminal laws of most States with relative impunity. Thus, the very purpose of this type of treaty is to strengthen and lengthen, on a basis of reciprocity, the arms of national justice. Some States do not decide *ex officio* whether a prisoner should or should not be extradited, but leave it to him to raise in a special judicial proceeding any objections he may wish to make against being extradited. Where, as is the case in Great Britain, municipal law permits a prisoner to take such an active part in extradition proceedings, he becomes the means by which it can be conveniently determined whether the demand of another State keeps within the reciprocal framework of an extradition treaty, and the limits within which the legislature has permitted the executive to hand over accused or convicted persons to the authorities of another State. It would, however, be a travesty of the real situation to imagine that States intended an extradition treaty to be the *Magna Carta* of the criminal profession, or to be based on any principles of international law which prisoners 'are entitled to invoke in their own right'.[20] Even in 1878, in the Report of the Royal Commission on Extradition, the typical intentions of parties to extradition treaties had been described as being, firstly, the common interest of States in the punishment of offences which threaten the wellbeing of society and, secondly, the interest of the State into whose territory the criminal had come that he should not remain at large therein.

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[18] *United States* v. *Arjona* (1887) 120 U.S. 479.

[19] See above under (b).

Little harm is done if such mutual limitations of the exercise of State jurisdiction by means of treaties are classified as a body of international criminal law. It is necessary, however, to remember that extradition treaties are not concerned with the substance of municipal criminal law, but with the administrative question of foiling the attempt of an accused or convicted person to obstruct by his evasive action the due course of municipal criminal justice.

(f) *International Criminal Law in the Material Sense of the Word.* It remains to explore whether, beyond municipal criminal law which is prescribed or authorised by international law, international criminal law in a sense comparable to municipal criminal law exists. In any social group in which a criminal law exists the highest values and interests are protected by rules of criminal law. International crimes would, therefore, be in all likelihood only acts of subjects or objects of international law which strike at the very roots of international society.[21] Such rules would have to be of a prohibitive character and would have to be strengthened by punitive sanctions of their own.

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[20] H. Lauterpacht, *l.c.* in note 15 above, p. 100.

The simple issue is whether international law knows of such rules which alone would constitute an international criminal law in the true meaning of the word.

The diametrically opposite views which are held on this subject in the doctrine of international law can be conveniently illustrated by reference to the mutations through which, since its fifth edition, Oppenheim's *International Law* has gone.

In the editions of his treatise for which Oppenheim, Roxburgh and Sir Arnold McNair were responsible, a sharp distinction was drawn between international delinquencies and international crimes, the former being recognised in international customary law and the latter being incompatible with the structure of the law of nations: 'An international delinquency is not a crime, because the delinquent State, as a Sovereign, cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done'. Furthermore, 'the nature of the Law of Nations as a law between, not above, Sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create a reparation of the moral and material wrong done'.[22]

In the fifth edition of Oppenheim's *International Law,* the first edited by Professor Lauterpacht, all of the first passage and the first sentence of the second passage were deleted. The second sentence was changed to read as follows: 'The principal legal consequences of an international delinquency are reparation of the moral and material wrong done'. In a footnote the learned editor expressed his doubt whether the views of Oppenheim and the previous editors accorded either with principle or practice.[23] By the sixth edition these doubts were resolved, and a new passage emerged: 'The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term'.[24] The seventh edition does not contain any further evolution of the position taken by Professor Lauterpacht in the previous edition of Oppenheim.[25]

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[21] Similarly, A. N. Trainin, *Hitlerite Responsibility under Criminal Law,* 1945, p. 37, and Qu. Wright, *The Law of the Nuremberg Trial* (41 A.J.I.L., 1947, p. 56).

[22] Oppenheim's *International Law,* Vol. 1, 1905, pp. 201 and 204.

In the third and fourth editions, the first of the two quoted passages was slightly modified. After 'punished', the following words were inserted: 'in the same way as a delinquent individual' (Vol. 1, 1920, p. 246; *ibid.,* 1928, p. 291).

It would be too simple an explanation of these changes to hold that they were necessarily due to new developments in international law since the time when Sir Arnold McNair edited Oppenheim's treatise. As becomes evident even from the published extracts of a memorandum written in 1944 by Sir Arnold for the United Nations War Crimes Commission, he then still adhered to the view that a 'State cannot be the subject of criminal liability'.[26]

Thus *Lauterpacht* v. *Oppenheim and Sir Arnold McNair* sums up conveniently the real problem of international criminal law. Used in any other sense this term is merely a loose and misleading label for topics which comprise anything but international criminal law, that is to say, rules germane to international law with two essential characteristics. Such rules must be of a prohibitive character and be endowed with specifically penal sanctions. Is there any evidence for the existence of such rules of international criminal law?

II—THE EVIDENCE FOR THE EXISTENCE OF AN INTERNATIONAL CRIMINAL LAW

As in other fields of international law, a detached approach to the subject has been made difficult by apodictic and contradictory *a priori* assertions. It was held, for instance, by Politis that as long as international law was a law between sovereign States it could not have a proper penal system.[27]

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[23] Oppenheim's *International Law*, Vol. 1, 1937, pp. 275 and 285.

[24] *Ibid.*, Vol. 1, 1947, p. 307.

[25] *Ibid.*, Vol. 1, 1948, p. 307.

[26] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, p. 181.

[27] *Les Nouvelles Tendances du Droit International*, 1927, p. 95. Cf. also Sir John Fischer Williams, *Some Chapters on Current International Law and the League of Nations*, 1929, p. 232 *et seq.*

Similarly, in his *Aspects of Modern International Law,* published shortly before the outbreak of the Second World War, Sir John Fischer Williams maintained that 'in so far as States are the subjects of international law they cannot be the subjects of criminal penalties for misdoing. . . . In fact the conditions of international life being what they are, it is fair to say that punishment or attempted punishment of a State is itself an offence against international order'.[28]

To this, Professor Lauterpacht retorts: 'It is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation'.[29]

Actually, there is no preconceived reason why international law should, or should not, recognise the existence of international crimes. If, on the basis of rules of international customary law or by means of treaties, States have limited their independence by acknowledging the existence of acts of their own or of individuals which other States may treat as international crimes, then such a state of affairs is compatible with their sovereignty; for this only exists within the limits drawn at any time by international law. Similarly, the group character of the subjects of international law does not decisively militate against the possibility of an international criminal law. Criminal liability of corporations under municipal law is not an entirely unknown phenomenon. Finally, the question whether the individual must be regarded as a subject or object of international law is neither here nor there. It is probably correct to hold that, so far, the evidence adduced in favour of the individual as an actual subject of international law is rather slender. Yet it would be an unwarranted assumption to hold that only if the international personality of the individual were recognised could the individual be treated as the object of proceedings of an international criminal character. It is possible to imagine a situation in which States mutually agreed on penetrating the monad of the sovereign State and to institute criminal proceedings against such duty-objects of international law. The criminal liability of slaves in Roman law and the criminal proceedings against animals in medieval penal law offer possible analogies.

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[28] *Aspects of Modern International Law,* 1939, pp. 84 and 88.

[29] *L.c.* in notes 24 and 25, p. 322. In substance, this passage was already contained in a footnote of the previous edition (*l.c.* in note 23 above. p. 286).

Whether any subjects or objects of international law are the addressees of rules of international criminal law depends on a very simple criterion: the evidence produced by those who assert the existence of an international criminal law. It is advisable to treat first the position under international customary law and only then to proceed to the examination of relevant treaties.

(a) *International Criminal Law as Part of International Customary Law.* So-called offences against the law of nations, piracy *jure gentium* and war crimes, can be eliminated from the outset. In these cases international law limits itself to prescribe or to authorise the assumption of criminal jurisdiction by States under their own municipal law.[30] If it should be argued that, owing to the primitive state of international law, such a delegation of functions to States does not militate against the description of these rules as being in substance principles of international criminal law, then this is only a circuitous way of saying that international criminal law in any proper sense does not exist.

In the absence of any more direct evidence, it is necessary to explore the attitude of elements of law-determining agencies in the field to the problem of international criminal law. In accordance with their proper hierarchic order,[31] the decisions of international courts and tribunals and the practice of individual States require to be examined. As so often happens, the doctrine of international law, self-contradictory as it is, is of relatively little assistance in determining the issue.

(i) *International Courts and Tribunals.* There is not a single instance in which international judicial institutions, deciding on the basis of international customary law, have classified an act of State as an international crime. It is not good enough to dispose of this rather relevant fact by reference to the voluntary character of international arbitration and adjudication. Sufficient cases have been submitted to international courts and tribunals in which, if they had felt so inclined, such international judicial institutions would have been free to describe violations of international customary law as international crimes instead of treating them as international torts or delicts.

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[30] See above under 1 (b) and (c).

[31] See further *l.c.* in note 10 above, p. 8 *et seq.*

In some cases the award of damages might be considered to be of punitive character if the tribunals concerned had not taken pains to point out that such damages had been awarded as moral or immaterial damages.[32] Furthermore, a good many of these awards of damages, especially in cases involving death, contain necessarily a considerable discretionary element. To imply that this is of a primarily punitive character is a *petitio principii.* In cases in which *restitutio in integrum* is impossible, such damages still partake of the character of reparation as distinct from that of a penalty. Against such rather subtle inferences stand express dicta of international tribunals in which, after full consideration, claims for punitive damages were outright rejected. These awards derive their especial significance from the fact that, in the opinion of the claimants, 'limitations of the arbitration agreement' [33] would not have prevented the tribunal concerned from awarding punitive damages.

In the *Lusitania Cases* (1923) the German-United States Mixed Claims Commission drew attention to the fact that counsel for the United States had 'failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favour of another presenting a claim on behalf of its nationals'.[34] In spite of the fact that, after the sinking of the *Lusitania,* this act had been labelled in Allied diplomatic notes and public statements with all the epithets so dear to the protagonists of international criminal law—ranging from the description of this illegal measure of unrestricted submarine warfare as piracy to its denunciation as an international crime [35]—it was held by the Commission: 'A sufficient reason why such damages cannot be awarded by this Commission is that it is without the power to make such awards under the terms of its charter—the Treaty of Berlin'.[36]

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[32] Cf. M. Whiteman, *Damages in International Law,* Vol. 1, 1937, p. 717.
In the considered view of Miss Whiteman, as expressed in the concluding third volume (1943) of her exemplary study, 'there is an apparent desire on the part of international tribunals to avoid punitive or exemplary damages. The assessment of damages is a civil and not a penal act' (p. 1874).

[33] H. Lauterpacht *l.c.* in note 25 above, p. 320.

[34] 18 A.J.I.L. (1924), p. 361, at p. 370.

[35] See, for instance, the views expressed by President Wilson in his Address to the Joint Session of the two Houses of Congress of April 2, 1917 (11 A.J.I.L. 1917, Supplement, pp. 144 and 150).

In the *Naulilaa Case* (1930) the Special Arbitral Tribunal between Germany and Portugal disallowed the Portuguese claim for punitive damages for the illegal acts committed by Germany against Portugal while the latter was still a neutral power. In the opinion of the Tribunal it had neither been the intention of the parties to the *compromis* to endow the arbitrators with any 'repressive power' nor the intention of the Peace Treaty of Versailles to give such a wide meaning to the Article in question.[37]

If any further evidence were required it is furnished by the *Corfu Channel Case* (1949). In the Security Council (February 18, 1947), Sir Alexander Cadogan described Albania's clandestine mining of the Corfu Channel as an 'international crime'. The Australian member of the Security Council characterised this act as an 'international crime of the most serious sort' and as amounting 'in substance to something very much of the character of mass murder' (February 24, 1947). The French and United States representatives called it an 'offence against humanity'.

On March 25, 1947, seven members of the Security Council (Australia, Belgium, Brazil, China, Colombia, France and the United States) voted in favour of a British draft resolution. According to this the laying of mines in peace-time without notification was held to be 'unjustified and an offence against humanity'. Owing to the exercise of his veto by the Soviet representative this resolution did not become operative.

In the preceding diplomatic correspondence between Great Britain and Albania, the British Government had described the incidents in the Corfu Channel as 'deliberate and outrageous' breaches of international law and maritime custom. In its note of December 9, 1946, the British Government emphasised the general character of the issue. In its opinion it did not only affect the two countries directly concerned, but was a matter of general 'safety of life at sea'. Albania's action was a 'criminal disregard for the safety of innocent seamen of any nationality lawfully using an international highway'.

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[36] *L.c.* in note 34 above, p. 371.

[37] United Nations. *Reports of International Arbitral Awards,* Vol. 2, 1949, pp. 1076–1077.

When, however, these alleged crimes or offences against humanity were subjected to legal scrutiny, the claimant government described the action of the Albanian Government as a 'deliberately hostile act', which called for reparation and an assurance from the Albanian Government that there should be no repetition of 'this unlawful action'. In the United Kingdom Memorial submitted to the International Court of Justice the Albanian action was classified as an 'international delinquency' and, in the special circumstances of the case, as an 'offence against humanity which most seriously aggravates the breach of international law and the international delinquency committed by that State'.

What was to be the liability which, in the view of the claimant State, attached to such an international delinquency or offence against humanity? According to the British Memorial, 'a State found to be delinquent under either (a) or (b) is liable under international law to make reparation for the damage resulting to others from the delinquency'. In so far as the measure of reparation or compensation was concerned, the United Kingdom accepted expressly the principles laid down by the Permanent Court of International Justice in the case of the *Factory at Chorzów* (1928), that is to say, the principles which apply in cases of breach of treaties and of international torts.

The decision of the International Court of Justice in the *Corfu Channel Case* (*Merits*–1949) followed the same lines. It affirmed Albanian responsibility under international law for the mining of the British men-of-war and for the damage and loss of human life which resulted from the explosion of the mines. The 'crime against humanity' was treated like any other international tort upon which, in the past, international courts and tribunals had adjudicated.[38]

The fact is that not in a single case has any international court or tribunal openly avowed that a State has committed a crime under international customary law as distinct from a breach of treaty or from the commission of an international tort, or visited such an act with at least the sanction of frankly admitted punitive damages. With the exception of international war crime trials which require separate discussion,[39] the practice of international courts and tribunals cannot be adduced as evidence of the recognition in international customary law of anything even faintly resembling the phenomenon of international crimes or of an international criminal law *stricto sensu.*

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[38] I.C.J. Reports, 1949, p. 23. Cf. also I.C.J. Pleadings, *The Corfu Channel Case*, Vol. 1, 1949.

[39] See below under 4.

(ii) *British State Practice.* In the present state of research into the practice of individual States it would be presumptuous for any one to pretend that he is able to speak of State practice as such. All that will be attempted here is to deal with some relevant instances from British practice. Especially in the nineteenth century, British State practice has shown in unmistakable language—and action—its concern with behaviour of States which public opinion in Great Britain considered to be outrageous, if not criminal.

In 1833 Palmerston was roused to action by a Brazilian law of 1831 and a decree of 1832 by which all negroes, imported or attempted to be imported into Brazil for the purposes of the slave trade, were to be re-exported to Africa. There was good reason to fear that such slaves would be killed by the slavers on the return journey or by African tribes if those slaves were ever to reach their destination. The British Foreign Secretary, therefore, maintained that, irrespective of Brazilian treaty obligations which made such legislation illegal, 'on the ground of humanity alone His Majesty's Government feel that they would be justified in pressing this subject upon the consideration of the Brazilian Government'.[40] All that Palmerston asked for was a repeal of the obnoxious Brazilian enactments.

Ten years later Stratford Canning protested to the Porte against the revival of the practice of the trial and execution of apostates from Islam. In the particular case in question a Greek youth who had been originally a Christian, had been executed. Canning demanded explanations and an unqualified assurance that in future the recurrence 'of such unwise and odious acts' should be precluded.[41]

At the Peace Conference of 1856, Clarendon admitted the principle of non-intervention in the internal affairs of other States, but affirmed that there were cases where the exception to this rule became equally the right and duty of foreign powers. The particular case before the Conference was the misrule in Naples which was lending fervour to the revolutionary nationalist and democratic movement. Clarendon asked the Conference to demand from the Government of The Two Sicilies an improvement in its system of government and an amnesty in favour of those condemned or detained without judgment for political offences.[42]

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[40] Palmerston to Fox (Rio de Janeiro), June 5, 1833 (22 *British and Foreign State Papers* (1833–1834), p. 74).

[41] Letter to M. Pisani (Dragoman), Constantinople, December 16, 1843 (32 (1843–1844) *ibid.*, p. 914). Cf. also Aberdeen's Dispatches to Canning of January 16, 1844 (*ibid.*, p. 915) and of March 19, 1844 (*ibid.*, p. 924).

The atrocities perpetrated a few years later against the Christian population in Syria led to collective action by the Powers, based on a convention with the Porte for the pacification of Syria.[43] The Ottoman officials and Druses responsible for these pogroms were tried before a tribunal established by the Porte at the request of the European Powers, and a commission, composed of all the Treaty Powers, supervised the trials.[44]

With the passive assistance of the Chinese Government, the Boxer Movement committed crimes which shocked public opinion abroad. The German minister was murdered. The German Legation was attacked and kept in a state of siege. The Chancellor of the Japanese Legation was murdered. Foreign civilians were killed and tortured, and foreign cemeteries were desecrated. These deeds led to the intervention of the European Powers, the United States and Japan. In their joint note of December 24, 1900, the Powers listed these 'crimes unprecedented in human history, crimes against the law of nations and against civilisation . . . committed under peculiarly odious circumstances' and demanded expiation and guarantees against their repetition. China accepted her responsibility and, by way of reparation, agreed to the dispatch to Berlin of an extraordinary mission, headed by an imperial prince, to express regret; the creation of a monument on the place where the murder of the German minister had been committed, with an inscription expressing the Emperor's regret for the murder; the severest punishment of the persons listed by the Powers and repeated in an imperial decree; the suspension for five years of official examinations in all towns where foreigners had been ill-treated or massacred; the erection of monuments in the foreign cemeteries which had been defiled; the right of each Power to maintain a permanent guard over its legation and to put the legation quarter in a defensible position, Chinese being prohibited to reside in such quarters and, finally, equitable indemnities to all the Powers.[45]

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[42] Protocol No. 22 of the Peace Conference of Paris, April 8, 1856 (46 (1855–1856) *ibid.*, p. 127).

[43] Convention of September 5, 1860 (50 (1859–1860) *ibid.*, p. 6).

[44] Protocol of the 21st Meeting of the Conference between the Representatives of the five European Powers and the Ottoman Porte, January 29, 1861 (51 (1860–1861), p. 414).

In other cases, international disapprobation of reprehensible acts of States has taken forms other than those of diplomatic remonstrance or of intervention. Refusal of recognition and the rupture of diplomatic relations offered means which, in the eyes of British Statesmen, were a suitable reply to outrageous behaviour on the part of foreign powers.[46]

What are the essential features of this practice?

First, it appears that States are not necessarily indifferent to acts which are incompatible with the most elementary dictates of humanity and civilisation.

Secondly, in defence of such values, States do not appear to appeal to any alleged international criminal law.

Thirdly, they do not appear to be aware of the existence of any specific international criminal procedure, but apply general devices which they use equally for the defence of their own rights and interests. In doing so without distinction between rights accruing to them from breach of treaty, from the commission of an international tort or from an 'international crime', they acknowledge the fact that international customary law has not yet led to that specialisation which permits a distinction to be drawn between international 'civil' and 'criminal' law. The degree of reprobation is not expressed by reference to rules of international law of a special character, but in the strength of the diplomatic language used and in the severity of otherwise unwarranted interference with rights sacrosanct in time of peace: the independence and territorial integrity of States.

Thus, the analysis of two of the most important elements of law-determining agencies does not appear to offer any evidence for the existence of either the concept of international crime or for rules of a specifically penal character in the body of international customary law. The position is still, as it was summed up by the Committee on the Permanent Court of International Justice of the First Assembly of the League of Nations in 1920: 'There is not yet any international penal law recognised by all nations'.[47]

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[45] United States, *Foreign Relations*, 1900, p. 244, and 1901, App., p. 306.
[46] See further this *Annual*, Vol. 1 (1948), p. 159 *et seq.*

(b) *International Criminal Law as Part of International Treaty Law.* In their mutual relations States are free to develop international customary law. Nothing prevents them from establishing on a treaty basis new branches of international law with principles and standards of their own.[48] If they desire to do so they may evolve rules of an international criminal law which apply to themselves, to any of their own organs or to any individual under their jurisdiction. The only question which arises *de lege lata*, is whether they have actually done so.

Piracy by treaty, the criminal jurisdiction of international institutions, the Convention against Terrorism of May, 1937, and pertinent developments of international law within the framework of the United Nations call for examination.

(i) *Piracy by Treaty.* An early instance of the assimilation to piracy of acts of foreigners which, otherwise, would have been beyond the cognisance of municipal criminal law, and whose unilateral punishment might have led to international complications, is offered by the Jay Treaty between Great Britain and the United States of November 19, 1794. By its Article 21, Great Britain was permitted to treat as pirates citizens of the United States who had taken commissions as French privateers.

The most celebrated case, however, is the gradual assimilation by means of bilateral and multilateral treaties of slave trading to piracy *jure gentium*, a policy steadfastly pursued by Great Britain since the beginning of the nineteenth century as part of her campaign to outlaw this peculiar form of free enterprise.[49]

The transformation in this case of a moral principle into a rule of international treaty law is of more than historical significance. The respect shown by British statesmen and courts[50] to

[47] League of Nations, Records of the First Assembly. Meetings of the Committees, Vol. 1, 1920, p. 589.
Cf. also the penetrating remarks on this subject in H. Kelsen, *Law and Peace*, 1942, p. 103 *et seq.*

[48] See further the present writer's *The Province and Standards of International Economic Law* (2 *International Law Quarterly*, 1948, p. 406 *et seq.*).

[49] See further *l.c.* in note 46 above, pp. 157–158.

[50] Cf. The *Le Louis* (1817) 2 Dodson 210. See also The *Antelope* (1825) 10 Wheat. 66.

the rights of other States under international law compares rather favourably with the impetuosity of contemporary reformers. They apparently think that the apodictic statement of cherished views in the form of alleged rules of existing international law will achieve more than to obscure the actual state of international law and to cast doubts on the scientific integrity of the doctrine of international law.

In a Declaration of February 8, 1815, the Congress of Vienna had denounced the Slave Trade as being 'repugnant to the principles of humanity and universal morality'. The Conference of Aix-la-Chapelle of 1818 solemnly declared that 'the negro slave trade was an odious crime, the disgrace of civilised nations, and that it was a matter of urgency to put an end for ever to this scourge which had so long desolated Africa, degraded Europe and afflicted humanity'. The plenipotentiaries of the five European Powers reiterated their condemnation of these 'criminal operations' in a Resolution of the Congress of Verona of November 28, 1822.

Neither statesmen nor writers, however, dreamt of asserting that a change in the existing position under international customary law had been brought about by declarations of this kind. They realised that such modifications of international law as were required depended on the free consent of every sovereign State concerned. Great Britain bought the limitation, and subsequent total prohibition, of the Spanish slave trade at the price of considerable financial sacrifices. In the same way she obtained the Portuguese renunciation of slave-trading north of the Equator. In some of the bilateral treaties concluded by Great Britain the African slave trade was stigmatised as piracy. In others Great Britain was content to secure the co-operation of contracting parties without such formal denunciation. When treaties in this field provided for adjudication of suspect vessels the mixed tribunals were authorised only to adjudicate on the ships involved and, in appropriate cases, to set free the slaves found in such vessels. The tribunals did not exercise any criminal jurisdiction over the owners and crews of these ships. This task was left to the municipal courts of the flag-States concerned. Under the multilateral Treaty of December 20, 1841, by which the slave trade was declared to be piracy, detained vessels and their crews were handed over to the flag-States to be dealt with by them in accordance with the municipal criminal laws of the contracting parties.

Even this justly celebrated venture in international legislation by means of bilateral and multilateral treaties did not, however, lead to the creation of international crimes in the strict sense of the word. All that the Powers attempted to do was to establish an exceptional jurisdiction for the visit and search of suspected ships; in the case of some of the bilateral treaties, to decide on an international level on the character of the vessels as slave traders, and to apply to slave-traders relatively uniform rules of municipal criminal law, prescribed in some cases by international treaties.

In the light of present-day over-statements in which actions of foreign governments are too readily decried as 'crimes against humanity', the most remarkable feature of this collective effort made a century ago is the clearheadedness and intellectual honesty with which these reformers went about their task. They were aware of their limitations under international law and used persistently the one straightforward way of overcoming these obstacles. At a time when the British Government, and its Minister in Washington, were doing everything in their power to induce the United States to conclude a treaty with Great Britain as a further link in the chain of Britain's bilateral treaties for the suppression of the African slave trade, Stratford Canning wrote to his namesake in the Foreign Office: 'There is no denying that the general concurrence of Maritime Powers is necessary to constitute slave trade piracy as part of international law, but it is also evident that before that general consent be obtained it is competent to any two Powers to carry the principle by mutual agreement into practice, as far as they are themselves concerned, and to apply it reciprocally with all its consequences to their respective subjects'.[51] Even after the conclusion of the multilateral Treaty of 1841, Great Britain did not ascribe to it any mythical legislative effect regarding non-signatories. In relation, for instance, to the Ottoman Porte, it was bluntly admitted that, 'in the absence of a treaty with the Porte it would be illegal to issue orders to British naval forces in the

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[51] Letter of April 22, 1823 (11 *British and Foreign State Papers* (1823–1824), p. 409, at p. 410).

Black Sea to detain Turkish vessels conveying slaves from Georgia and Circasia'.[52]

It was the salutary effect of this law-abiding practice that States were induced to set an example by raising their own standards of conduct in concord with like-minded States or in co-operation with States which, for other reasons, considered it worth while to live up to the standards expected by the world's leading Power. Although the anti-slavery treaties failed to make any notable contribution to the development of international criminal law, they are an object lesson to contemporary enthusiasts—and professionals—in this particular field.

The attempts made in the inter-war period to develop piracy by way of analogy bore little fruit. The effort to assimilate illegal submarine warfare to piracy proved to be abortive. Admittedly the reasons for this failure were unconnected with Article 3 of the unratified Washington Treaty, relating to the use of submarines and noxious gases in warfare, of February 6, 1922. Yet even the draft, as it stood, merely provided for the optional trial of any such 'as if' pirate 'before the civil or military authorities of any Power within the jurisdiction of which he may be found'.[53]

The Nyon Agreement of September 14, 1937, characterised in its Preamble the submarine attacks on merchant ships of other than the conflicting Spanish parties as measures 'which should be justly treated as acts of piracy'. This, however, merely provided the background and justification for the collective and repressive measures on which the signatories had agreed. Thus, from the point of view of international criminal law, neither of these treaties constituted any further development towards the creation of an international criminal law. In Professor Lauterpacht's view the Nyon Agreement of 1937 has a special significance as its signatories claim to assume jurisdiction over 'offenders of whatever nationality'. Here 'we are confronted with the direct subjection of individuals to international law in a manner which cannot be interpreted as a mutual concession of jurisdictional rights'.[54] In the light of what should be common knowledge to any student of international relations and of the hardly hidden intentions of the contracting parties, this apparent difficulty resolves itself without undue difficulties. It must only be remembered that these submarines were of, at most, three possible nationalities. For the sake of politeness, these countries were not specifically named. It was clear that if any such submarine were met and sunk its home State would not claim any connection with such a 'pirate' submarine. Yet to base any development of rules of international law on a typical instance of *politesse diplomatique* is a feat of remarkable mental acrobatics. It confirms how much ingenuity is needed to defend an untenable proposition.

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[52] The Secretary to the Admiralty to Lord Wodehouse (Foreign Office), December 2, 1854 (45 *ibid.* (1854–1855), p. 1145). See also the Note from Lord Aberdeen to M. Lisboa (Brazil) of August 6, 1845 (34 *ibid.* (1845–1846), p. 711).

[53] See further *l.c.* in note 12 above, pp. 96–97.

(ii) *Criminal Jurisdiction of International Institutions.* On an embryonic scale, developments towards an international criminal law may be detected in the case of some international institutions.

International river commissions, such as the European Danube Commission, the Central Commission of the Rhine and the International Commission of the Elbe had some limited powers of punishing contraventions of their regulations for river police. In the case of the Rhine and Elbe Commissions, appeal from the court of first instance could alternatively be made to the Commission or to local courts.[55] In all three cases these rights of jurisdiction were in substance police powers and, at the most, nominally of a penal character.

The Mixed Courts in Egypt and Tangier are of little interest; for they only substitute an abstraction from European criminal codes and procedures for a local criminal law and administration which were not considered to give sufficient guarantees of fair treatment to nationals of Western States.[56] In any case they are a relic of the past. On October 14, 1949, the Mixed Courts in Egypt came to an end. The chief value of their penal practice now lies in the material which they provide for the comparative study of Western criminal laws and procedures as applied in a Near Eastern setting.

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[54] *The Subjects of the Law of Nations*, 63 *Law Quarterly Review* (1947), p. 442.

[55] See, for instance, Article 44 of the Elbe Convention of February 22, 1922 (M. O. Hudson, *International Legislation*, Vol. 2, 1931, pp. 851–852).

[56] The standard work is still J. Y. Brinton, *The Mixed Courts of Egypt*, 1930. See further the Montreux Convention for the Abolition of Capitulations in Egypt of May 8, 1937 (Treaty Series, 1937, No. 55); the authoritative anonymous article on the Convention in 19 *British Year Book of International Law*, 1938, p. 161 *et seq.*; A. McDougall, *The Termination of the Egyptian Mixed Courts* (25 *ibid.*, 1948, p. 386 *et seq.*); and G. H. Stuart, *The International City of Tangier*, 1931, p. 193 *et seq.*, and *The Problem of Tangier* (1 *Year Book of World Affairs*, 1947, p. 92 *et seq.*).

The courts of the Inter-Allied Rhineland Commission, the courts of the Governing Commission of the Saar Basin, the Plebiscite Courts in Upper Silesia of 1921 and in the Saar of 1935, and the Control Commission Courts in post-1945 Germany do not contribute much more to the elucidation of our subject. They either applied their *ad hoc* statutes and orders, replaced the local criminal law by that of the respective occupying powers or themselves administered the local law. Their function did not consist in the evolution of an international criminal law. It was their task to apply an internationally agreed, or their own, municipal criminal law in cases in which the foreign powers concerned were not prepared to entrust such jurisdiction to the ordinary organs of local criminal justice.[57] Like the Mixed Courts, these instances are exceptional cases of the temporary substitution of one municipal criminal law by that of other powers. They are freaks which confirm the general rule.

Much play has been made of the, in part, penal character of Article 16 of the Covenant of the League of Nations. Actually this Article stated very clearly the legal consequences of a disregard by a member State of its obligations under Articles 12, 13 or 15 of the Covenant. Such a pact-breaker 'shall *ipso facto* be deemed to have committed an act of war against all other members of the League'—and not an international crime.

It has been suggested that this qualification was supplied by the Resolution of the Eighth Assembly of the League of Nations, by which aggressive war was branded as an 'international crime'. Yet, whatever the legal significance of this resolution may have been, the members of the League showed by their actual policies towards Japanese aggression in China and by the farce of their sanctions experiment against Italy that, at the most, they regarded these violations of the Covenant in the same light as any other breach of treaty obligations. To hold differently now would appear to be a manifest case of *venire contra factum proprium* on the part of any State which, during the Appeasement Period, even granted *de jure* recognition to the fruits of Italy's aggressive war against Ethiopia.

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[57] See further P. Huguet, *Le Droit Pénal de la Rhénanie Occupée*, 1923; E. Fraenkel, *Military Occupation and the Rule of Law*, 1944, p. 171 *et seq.*; F. L. Carsten, *The British Summary Court at Wiesbaden*, 1926–1929 (7 *Modern Law Review*, 1944, p. 215 *et seq.*); Ordinance No. 2 (1945) on Military Government Courts of the Military Government for Germany (*Military Government Gazette*, 1945, p. 7) and the British Ordinance No. 68 on Control Commission Courts of January 1, 1947 *ibid.* 1947, p. 437 *et seq.;* S. Wambaugh, *Plebiscites Since the World War*, Vol. 2, 1933, p. 218 and *The Saar Plebiscite*, 1940, pp. 228 *et seq.* and 401 *et seq.*

(iii) *The Convention against Terrorism.* The much advertised Convention for the Prevention and Punishment of Terrorism of November 16, 1937, contained an engagement on the part of the contracting parties to make acts of terrorism of an international character, that is to say, committed on the territory of another contracting party, punishable under municipal criminal law. It also extended the scope of traditional extradition in the case of political crimes and provided for police co-operation between the signatories against terrorists. A supplementary convention of the same date, which never came into operation, provided for an auxiliary type of an international criminal court. Its jurisdiction was to be limited to cases in which a signatory to the main convention refused to try a terrorist in its own courts or to extradite him to another contracting party. Again, the Convention against Terrorism extended merely the scope of crimes which, by treaty, were prescribed as punishable offences under municipal law and the customary range of extradition treaties.

(iv) *International Law within the Framework of the United Nations.* Has this situation been in any way changed since the inauguration of the United Nations?

In its Resolution on the Extradition and Punishment of War Criminals of February 13, 1946, the General Assembly recommended to members and non-members the extradition of war criminals to the countries where they had committed their crimes for the—twice stated—purpose of 'trial and punishment *according to the laws of these countries'*.

The trials of the major German and Japanese war criminals, however, before international military courts have been hailed as major departures from traditional patterns. The legal standards—or their absence—of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment.[58] Such criticism cannot be levelled against the judges of Nuremberg. Apart from the fact that the acquaintance of the Bench and of the Prosecution with international law had been somewhat recent,[59] the proceedings were conducted with scrupulous regard for the rights of the Defence. In form, the law applied by the tribunal was international law: international customary law, in so far as jurisdiction regarding war crimes in the technical sense was concerned, and newly established treaty law regarding crimes against peace and humanity.[60] It emerges from the British Aide-Mémoire of April 23, 1945, how dubious the British Government felt about these war crimes in the wider sense. In so far as crimes against peace were concerned, it was not at all clear to the British Government whether they could 'properly be described as crimes under international law'.[61] In a further memorandum of May 28, 1945, and in an Aide-Mémoire of June 3, 1945, these doubts were laid at rest.[62] In a different form, however, they again came to the surface at the meeting of the Four-Power Conference of June 29, 1945. Sir David Maxwell Fyfe pointed out that one thing was essential: 'What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won't be any discussion on whether it is international law or not'.[63] Nevertheless, the four Powers were fully entitled to take the action on which they had decided both regarding the German and Japanese war criminals. As was pointed out in the Nuremberg Judgment, the signatories to the Charter of the Tribunal only did jointly what each of them, if in sole control of Germany, could have done alone. In the exercise of their *condominium* over Germany, the occupying Powers were not limited to the application to Germany of the customary laws of warfare. In their capacity as co-sovereigns of Germany they were free to agree on any additional legal principles which they cared to apply. Similarly, the unconditional surrender of Japan provided a sufficient legal basis for trying the Japanese war criminals in accordance with legal principles which went beyond the scope of international customary law. For these very reasons, however, both these international military tribunals were in substance more akin to municipal war crime courts than to truly international tribunals.

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[58] See further, Lord Hankey, *Politics, Trials and Errors*, 1950, p. 80 *et seq.*, and G. Ireland, *Uncommon Law in Martial Tokyo* (4 *Year Book of World Affairs*, 1950, p. 54 *et seq.*).

[59] Cf. *l.c.* in note 10 above, pp. 312–313 and 323–324.

[60] Cf. *ibid.*, p. 317 *et seq.*

[61] United States. Department of State. *International Conference on Military Trials, London, 1945*, 1949, p. 19.

[62] *Ibid.*, pp. 39 and 41.

[63] *Ibid.*, p. 99.

By a Resolution of December 11, 1946, the General Assembly affirmed the principles of international law recognised by the Charter and Judgment of the Nuremberg Tribunal. The maximum of legal significance that can be attributed to this Resolution is that, in future, any member of the United Nations will be estopped from contesting the validity of these principles as rules of international law. This means that in future wars the extraordinary jurisdiction of belligerents regarding war crimes in the technical sense will be extended to crimes against peace and humanity committed in connection with such wars. Thus, the sphere of extraordinary State jurisdiction under municipal criminal law has been vastly enlarged and still tighter ropes been drawn in advance round the necks of the losers of any other world war.

Another effort of the United Nations which calls for comment is the draft Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948. The term was first proposed by Dr. Lemkin in the course of the war[64] and incorporated on his suggestion into the United States Indictment of the Major German War Criminals. The Assembly Resolution on Genocide of December 11, 1946, and the Draft Convention of 1948, too, are the result of a remarkable one-man campaign. The shades of the victims of Auschwitz and Belsen haunted the conscience of those who knew better, but who considered it to be statesmanship to submit to the pressure of unremitting lobbying.

Genocide is described in the Convention as a 'crime under international law' and includes a number of acts committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The contracting parties undertake to enact the necessary legislation to provide effective punishment for persons guilty of the offences which are enumerated in the draft Convention. The Convention applies to any persons committing genocide, 'whether they are constitutionally responsible rulers, public officials or private individuals'. Persons charged with genocide are to be tried by the courts of the State in the territory of which the act was committed or by an international penal tribunal 'as may have jurisdiction with respect to these contracting parties which shall have accepted its jurisdiction'.

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[64] *Axis Rule in Occupied Europe*, 1944, p. 79 *et seq.*

In order to appreciate the value of this draft it may be permissible to look at the reality of the situation.

The worst offender in this field in recent years has been Hitlerite Germany. The occupying Powers and the other United Nations had plenty of opportunity to bring these criminals to justice. The same applies to any crimes of this character which, in China and elsewhere, the Japanese had committed. In the case of the forcible deportations of Germans from Czechoslovakia, Eastern Germany and Poland, there is little doubt regarding the inhumanity with which many of these deportations have been carried out. There would not, however, be sufficient evidence to prove intent of committing genocide on the part of those who were responsible for these acts. In the case of the mass deportations of Baltic nationals by the Soviet Union the intention of those responsible for these deportations was probably primarily strategic. Finally, Pakistan and India, as well as Israel and the Arab States have accused each other of the commission of this crime.

If the Convention were applied to any of these cases it would be for Czechoslovak, Indian, Iraqi, Israeli, Pakistani, Polish, Russian and Jordan courts to find on the acts committed by their own governments. Hardly any of these alleged crimes have been committed spontaneously by irresponsible individuals. Yet the whole Convention is based on the assumption of virtuous governments and criminal individuals, a reversion of the truth in proportion to the degree of totalitarianism and nationalism practised in any country. In any event, even if this assumption were correct, the criminal law of every civilised State provides sufficiently against any individual act of the kind which are enumerated in the Convention. As it was once put by Sir Hartley Shawcross, murder remains murder whether committed against one or a million. In either case a criminal can be hanged only once.

Thus, the Convention is unnecessary where it can be applied and inapplicable where it may be necessary. It is an insult to the intelligence and dangerous, because it may be argued *a contrario* by brazen upholders of an unlimited *raison d'Etat* that acts enumerated in the Convention, but not committed with the *intent* of destroying groups of a people 'as such' are legal. The Convention—like the Universal Declaration of Human Rights—is, as it has been formulated politely by Professor Brierly, symptomatic of a 'tendency to seek a sort of compensation for all that is so terribly discouraging in the international outlook of today by dissipating energies to achieve results which prove on examination to mark no real advance'.[65]

III—THE PROBLEM OF INTERNATIONAL CRIMINAL LAW *de lege ferenda*

International law prescribes municipal criminal law in circumstances in which, without such limitations of unrestricted State sovereignty, municipal criminal law might fall below internationally accepted minimum standards. It authorises the exercise of criminal jurisdiction under municipal law in circumstances in which, otherwise, such jurisdiction might be lacking or remain controversial. But international law has not yet evolved a branch of criminal law of its own.

To any one who does not conceive of law in a vacuum, but is aware of the interrelationship between law and its specific social background, such a result will not be surprising; for international society still lacks any of the conditions on which the rise of criminal law depends.

The origin of criminal law in primitive communities is still the subject of controversy.[66] It is probably still advisable to avoid the risk of undue generalisation.

For some primitive communities the sacral origin of criminal law is a plausible hypothesis. Yet even in such communities, from an early stage onwards, serious breaches of military discipline were branded as crimes. Other offences, however, may well have been treated as crimes because this was thought to be the only means of averting the vengeance of the gods on the whole tribe. Awe of the gods, and fear of the priests, who ministered to them, provided a substitute for the lack as yet of a strong central power, which was to be the firm foundation of criminal law in a later phase of its evolution. Unfortunately, world society has no common gods, and the high priests of international law do not inspire the holy terror of the magicians of old.

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[65] *The Genocide Convention* (*The Listener*, 1949, p. 401).

[66] See further B. Malinowski, *Crime and Custom in Savage Society*, 1932; A. S. Diamond, *Primitive Law*, 1935; J. Lambert, *La Vengeance Privée*, 1936.

There were, however, other primitive communities in which criminal law owed its origin to more rational causes. In such social groups, acts which, from the point of view of the community, were considered to be most reprehensible and dangerous were treated as crimes, that is to say, as acts which could not be left to be settled by blood feuds or by way of composition. Yet for a long time such communities did not consider themselves strong enough to insist on punishment proper. They first chose outlawry instead of, or as an alternative to, punishment.[67] In the formulation of Pollock and Maitland, early English law 'could not measure its blows; he who defied it was outside its sphere; he was outlaw. He who breaks the law has gone to war with the community; the community goes to war with him'.[68] International outlawry as a means of retaliation on the part of subjects of international law against persistent lawlessness on the part of other States is at least a feasible proposition. Doubts which at the present stage of the evolution of world society arise on the wisdom of applying this device in inter-State relations are primarily connected with the present division of the world into two diametrically opposed camps. Each of the antipodes is likely to hold its protecting shield over the black sheep within its own fold, and little would be gained if the two camps were ever mutually to outlaw each other.

Yet we need not concern ourselves only with primitive communities. The rise of the modern State, too, has its lesson to tell. After the princes of Europe had established their absolute power within territorially defined States, then, in the words of Hobbes,[69] they firmly held in their hands both the swords of war and of justice. Both swords were 'annexed to the Sovereign Power'. In the words of the old English forms of indictment, crimes were committed 'against the peace of our Lord, the King, his Crown and Dignity'.

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[67] See further *l.c.* in note 12 above, p. 85 *et seq.*

[68] Sir Frederick Pollock and F. W. Maitland, *The History of English Law*, Vol. 2, 1923, p. 449.

[69] *De Corpore Politico,* 1684, Part 2, Chap. 1, 8.

Here lies the explanation why, in the present state of world society, international criminal law in any true sense does not exist.

In the Atomic Age, most of the 'sovereign and equal' members of the United Nations have lost their political sovereignty and know their humble station in the international hierarchy. In form, they all are subject to the Charter of the United Nations, and its Chapter Seven, which, like Article 16 of the Covenant of the League of Nations, embodies provisions that are, according to Professor Lauterpacht, 'in part, of a penal character'.[70] There are, however, some powers who are not only in fact immune to the application of collective enforcement measures, but who, in law, too, are in a privileged position. By the reservation of their veto power, they have made sure that only paper swords of war and justice can be wielded against them by the international quasi-authorities of the United Nations.[71] They are fully conscious of the fact that the real swords of war and justice are still 'annexed to the Sovereign Power'.

In such a situation an international criminal law that is meant to be applied to the world powers[72] is a contradiction in terms. It presupposes an international authority which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be war under another name. Thus, proposals for a universal international criminal law fall into the category of the one-way pattern for the reorganisation of international society.[73] With other schemes of this type they share the deficiency of taking for granted an essential condition of their realisation, a *sine qua non* which cannot easily be attained: the transformation of the present system of world power politics in disguise into at least a world federation.[74] If, and when, the swords of war are taken from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice.

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[70] *L.c.* above in note 25, p. 322. See also above under 11b (2).

[71] Thus, by implication, Professor Lauterpacht himself gives the verdict on the position taken by him: 'It is clear that unless the criminal responsibility of States is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international agencies operating within the orbit of a politically organised international society' (*l.c.* in note 25 above, p. 323, note 1).

[72] See, for instance, V. Pella, *La Criminalité Collective des Etats et le Droit Pénal de l'Avenir,* 1926. For further references to proposals *de lege ferenda,* see H. von Weber, *Internationale Strafgerichtsbarkeit,* 1934; G. Weis, *International Criminal Justice in Time of Peace* (28 *Transactions of the Grotius Society,* 1943, p. 38 *et seq.*); M. A. Caloyanni, *Les Criminels de Guerre et le Nouveau Droit Pénal International;* F. B. Schick, *International Criminal Law—Facts and Illusions* (11 *M.L.R.* 1948, p. 290 *et seq.*), and United Nations, International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction,* 1949.

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[73] See further the present writer's *Manual of International Law,* 1947, pp. 146–147.

A more promising, though less ambitious, line of development might be the creation of international criminal law within each of the two halves of present-day international society. If either side were content to look not primarily at the international 'crimes' committed by the other, but set to work to remedy the deficiencies within its own world, then proposals for an international criminal law might lose some of their less attractive ideological features and even claim a certain educational value. International criminal law might then contribute to the articulate formulation of the positive values for which the Western and Eastern worlds stand.

In *Hitlerite Responsibility under Criminal Law,* 1945, Professor Trainin ascribes the 'extremely poor development' of international criminal law to the 'general character of international juridical relations during the epoch of imperialism' (p. 11).

While the epoch of imperialism is an especially violent form of power politics, the chances for international criminal law do not appear to have been more brilliant in pre-imperialist phases of power politics. This applies irrespective of whether the term is understood in the specific Marxist connotation in which Professor Trainin uses it or as it is used in the general language of sociology and of international relations. In any case, does Professor Trainin imagine that the territorial expansion of the Soviet Union in the course of, and since, the Second World War is symptomatic of a post-imperialist period? It would be of equal interest to have his views on the identity of present-day 'aggressive imperialist rulers' (*ibid.*).

[74] It is to the credit of Lorimer that, more than half a century ago, this lonely figure perceived clearly the intrinsic connection between schemes for an international criminal law *stricto sensu* and for an international government. Cf. his *Institutes of the Law of Nations,* Vol. 2, 1884, p. 279 *et seq.*

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